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In the Supreme Court of the United States

FAIRFAX REALTY, INC., NORTH PLAINS LAND COMPANY, LTD., AND NORTH PLAINS DEVELOPMENT COMPANY, LTD.,

Petitioners,

v.

ARMAND L. SMITH AND VIRGINIA L. SMITH,

Respondents.

On Petition for a Writ of Certiorari to the Utah Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The plaintiffs in this case alleged that the transfer of partnership property to a real estate investment trust ("REIT") constituted breach of contract, breach of fiduciary duty, and conversion. The jury awarded $1.1 million in compensatory damages and $5.5 million in punitive damages, to which the trial court added almost $525,000 in attorneys' fees and costs. Though reducing the compensatory award by nearly $100,000, the Utah Supreme Court affirmed the punitive award over petitioners' excessiveness challenge. Invoking findings by the trial court about aggravating factors that the jury "could have found," the Utah Supreme Court held that petitioners' "actions * * * support a substantial award of punitive damages." It then proceeded to hold that the approximately 5.5:1 ratio of punitive to compensatory damages fell "well within the single-digit ratio discussed by" this Court in *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 123 S. Ct. 1513 (2003).

The general question presented is whether the punitive award is unconstitutionally excessive. More specifically, this petition presents the following two questions that recur in punitive damages litigation:

1. Whether punitive awards that are less than ten times compensatory damages are presumptively constitutional, notwithstanding this Court's statement in *State Farm* that, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to the compensatory damages, can reach the outermost limit of the due process guarantee."

2. Whether, in the context of determining the degree of reprehensibility of a defendant's conduct, the practice of giving the plaintiff the benefit of all conceivable inferences from the evidence is consistent with the "[e]xacting appellate review" of punitive damages awards that this Court held to be constitutionally required in *State Farm* and *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

RULES 29.6 AND/OR 14.1 STATEMENT

Petitioner Fairfax Realty, Inc. is a privately owned company that owns approximately 16% of petitioner North Plains Land Company, Ltd and 16% of petitioner North Plains Development Company, Ltd. NP Investment Company, a partnership consisting of former officers of JP Realty, Inc., owns 10% of North Plains Development Company, Ltd. All other ownership interests are private entities.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Fairfax Realty, Inc. (formerly Price Development Company),[1] North Plains Land Company, Ltd., and North Plains Development Company, Ltd. (collectively "Fairfax") respectfully petition for a writ of certiorari to review the judgment of the Utah Supreme Court in this case.

OPINIONS BELOW

The opinion of the Utah Supreme Court (App., *infra*, 1a-25a) has not yet been published in the official reports but may be found at 2003 WL 22272111. The judgment of the trial court entering the special verdicts of the jury for compensatory and punitive damages and its special findings with regard to the punitive award (App., *infra*, 26a-38a) are unreported.

JURISDICTION

The Utah Supreme Court issued its opinion and judgment affirming in part and reversing in part the trial court's judgments on October 3, 2003. A timely petition for rehearing was denied on October 29, 2003. This Court possesses jurisdiction to review the decision of the Utah Supreme Court under 28 U.S.C. § 1257(a).

The Utah Supreme Court's conclusion that petitioners "failed to adequately brief the excessiveness issue as a federal constitutional challenge" and its citation of Utah cases for the proposition that it "is not obligated to address issues that are not adequately briefed" (App., *infra*, 15a & n.12) do not deprive this Court of jurisdiction to consider petitioners' contention that the size of the punitive award violated the federal due process

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[1] Price Development Company changed its name in January 1994 to Fairfax Realty. Tr. 1124. To avoid confusion with the entity created to hold the properties contributed to the REIT, which was also named Price Development Company, the original Price Development Company will be referred to as Fairfax throughout this petition.

clause. As this Court has explained, proper preservation of a federal constitutional claim "does not demand the incantation of particular words; rather it requires that the lower court be fairly put on notice as to the substance of the issue." *Nelson* v. *Adams USA, Inc.*, 529 U.S. 460, 469 (2000). Accordingly, if "the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928).

In this case, there can be no doubt that petitioners "fairly put [the Utah Supreme Court] on notice" that their excessiveness claim was based on the due process clause as well as state law, asserting in their opening brief:

> The same conclusion is directed by federal law. Under the three guideposts for federal due process analysis – "'[1] the degree of reprehensibility of the [conduct]; [2] the disparity between the harm suffered . . . and [the] punitive damage award]; and [3] the difference between this remedy [the punitive damage award] and the . . . penalties authorized or imposed in comparable cases,'" *Campbell*, 2001 UT 89, ¶39 (citing *BMW* [*of N. Am., Inc.* v. *Gore*], 517 U.S. [559,] 574-75 (1996) – the award here is excessive and requires reversal or significant reduction.

App., *infra*, 41a (alterations in original except in case citation). See also Brief of Appellants at 38-39, *Smith* v. *Fairfax Realty, Inc.*, No. 20010673-SC, 2003 WL 22272111 (Utah Oct. 3, 2003) (citing Utah Supreme Court's observation in *Campbell* that the second factor under Utah law "'mirrors'" the reprehensibility guidepost described in *BMW*).[2]

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[2] Though finding that petitioners did not adequately brief the federal constitutional issue, the Utah Supreme Court nevertheless observed that there is a substantial overlap between the state-law factors and the *BMW* guideposts (App., *infra*, 15a) — precisely petitioners' reason for not separately briefing the point — and proceeded to liberally cite *BMW*, *State Farm*, and other federal excessiveness

This kind of specific reference to the due process clause and citation of due process case law is more than sufficient to preserve the federal issue under this Court's precedents. See, *e.g.*, *Taylor* v. *Illinois*, 484 U.S. 400, 406-07 n.9 (1988) (petitioner's Sixth Amendment compulsory process claim was properly presented to state court even though it asserted only a due process violation where petitioner cited and relied upon two of Court's Compulsory Process Clause cases); *Eddings* v. *Oklahoma*, 455 U.S. 104, 113-14 n.9 (1982) (although petitioner failed to present precise cruel and unusual punishment argument to state courts or to cite leading Court precedent supporting argument, the argument was adequately presented by the general argument that death penalty was excessive punishment, because Court's "jurisdiction does not depend on citation to book and verse").

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that "[n]o State shall * * * deprive any person of life, liberty, or property, without due process of law."

STATEMENT

The Utah Supreme Court's decision affirming the $5.5 million punitive award against petitioners is the product of two fundamental misapplications of this Court's punitive damages precedents that, regrettably, are not unique to this case.

First, the Utah Supreme Court construed this Court's statement in *State Farm* that, "in practice, few [punitive] awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process" (123 S. Ct. at 1524) to mean that ratios "within the single-digit ratio discussed by [this Court]" in *State Farm*

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precedents in its analysis (*id.* at 18a-19a, 21a-22a, 23a-24a).

present no constitutional concerns. App., *infra*, 24a. That interpretation is squarely precluded by this Court's further statement that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee" (123 S. Ct. at 1524), yet the Utah Supreme Court is far from the only court to focus exclusively on whether the punitive/compensatory ratio is within single digits. Indeed, of the 23 reported post-*State Farm* cases in which compensatory damages (or potential harm) have exceeded two hundred thousand dollars, in ***only one*** did the reviewing court hold that *State Farm* necessitated remittitur to a 1:1 ratio. Review is therefore warranted to make clear to the lower courts that single-digit ratios of punitive to compensatory damages are not immune from constitutional scrutiny and, indeed, that, when compensatory damages are substantial, a powerful justification is needed to sustain a ratio in excess of 1:1.

Second, in concluding that petitioners' "actions amount to affirmative misconduct showing deliberate misrepresentation and disregard of the rights of the [respondents]" and hence "support a substantial award of punitive damages" (App., *infra*, 19a-20a), the Utah Supreme Court relied on the trial court's conclusion that "the jury ***could have found*** by clear and convincing evidence a pattern of deceit, failure to disclose and misrepresentation" (*id.* at 35a (emphasis added)). But there were no actual jury findings beyond the ones necessary to establish the elements of the torts for which petitioners were found liable. In essence, the trial court applied the standard of review used to test the sufficiency of evidence for a liability finding — taking all evidence in the light most favorable to the verdict and giving the plaintiff the benefit of all conceivable inferences from the evidence — and the Utah Supreme Court then used the trial court's conclusions in determining that petitioners' conduct was sufficiently reprehensible to warrant a $5.5 million punishment. This doubly deferential approach cannot be squared with the "[e]xacting appellate review"

required by this Court in *State Farm,* 123 S. Ct. at 1520, and *Cooper Industries*. The *de novo* review of the three *BMW* guideposts required by those cases precludes treating the ***degree*** of reprehensibility as the kind of factual finding as to which "sufficiency-of-the-evidence" review suffices. Instead, because, in the absence of jury interrogatories, there is no way to know how reprehensible the jury deemed the conduct to be, courts may defer only to "specific findings of fact" by the jury (*Cooper Indus.*, 532 U.S. at 439 n.12). Nevertheless, most courts continue to deprive defendants of the due process to which they are entitled by deferring to phantom factual findings when determining the degree of reprehensibility of the conduct. Review is warranted to correct this prevalent problem in the administration of punitive damages.

The relevant facts are as follows:

1. *The partnerships and the North Plains Mall.* In the early 1980s, Fairfax purchased a 33-acre parcel in Clovis, New Mexico, from Armand Smith and others,[3] in exchange for $2 million and a 15% interest in two limited partnerships — North Plains Development Company, Ltd. and North Plains Land Company, Ltd. ("the Partnerships"), whose purpose was to construct and develop a shopping center (the "Mall") on the purchased land. P. Exhs. 15, 16; Tr. 403-04, 1809-10. The Mall was constructed with a $9 million interim loan from Wells Fargo Realty Advisors, which the Partnerships subsequently paid off using the proceeds of a $12 million short-term loan from Chemical Bank in October 1989. Tr. 1058-59, 1812. During the period after 1985, the Mall operated at a deficit. Tr. 1058.

In December 1989, a "capital call" was made on the partners, requesting contributions in accordance with their

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[3] Armand Smith and his ex-wife Virginia will be collectively referred to as "the Smiths." References to "Smith" are to Armand Smith alone.

ownership interests, in order to cover the shortfall between the cost of additional construction on the Mall and financing for the project raised by the Partnerships. The capital call resulted in a contribution of approximately $228,000 from the Smiths and $1,294,210 from Fairfax. Tr. 239-40. Smith also contributed water rights worth $30,000 to the Partnerships for use by the Mall's tenants. Tr. 248-49. To cover the Mall's operating deficits, Fairfax obtained "gap loans" of $1.5 million from its own bank line and advanced those funds as a loan to the Partnerships. Tr. 1060, 1115-16, 1911-12.

2. *Attempts to refinance the Chemical Bank loan.* The Chemical Bank short-term loan had a maturity date of October 1991. For several years prior to that date, Fairfax attempted to obtain a long-term loan or other financing arrangement through a national broker. Tr. 1061-62, 1898-99, 1929. As the maturity date approached, Fairfax engaged another national broker to seek other financing arrangements or, alternatively, a sale of the Mall to pay off the Chemical Bank loan. Tr. 422-23, 1243, 1599-1600, 1613-15, 1914, 1932-33. As of 1991, Chemical Bank had a "growing concern" that the loan "was not going to be repaid any time soon" due to the unfavorable location of the Mall and adverse market conditions. Tr. 1649.

Fairfax successfully sought five short-term extensions of the Chemical Bank loan from 1991 to July 1993 to allow it to seek other financing or a buyer. Tr. 1065-66. Due to the amount of the loan, however, the Mall was considered a "seriously distressed" property. Tr. 1719, 1784-85. Substantial efforts to finance or sell the Mall throughout 1992 proved to be unsuccessful, due in large part to the collapse of the national permanent financing and real estate markets. Tr. 1063, 1066-67, 1076, 1600-03. Only one institutional lender, Allstate Insurance Company, actively considered refinancing, and at an amount of only $9 million; this figure subsequently dropped to $6 million — about half the sum needed. Tr. 1604. Fairfax was told by its second broker in December 1992 that he had "exhausted all the avenues and there was basically no one

interested in buying the property or in arranging a financing." Tr. 1604.

Upon expiration of the fifth extension in July 1993, Chemical Bank served a notice of default and demanded payment in full of the $11.3 million outstanding loan balance. Tr. 1106-07. In its search for financing alternatives, Fairfax was alerted by several investment banks to the possibility of the REIT structure — which had risen in nationwide popularity due to the collapse of the financing market for real estate — as a potential financing vehicle. Tr. 1082-83, 1098. Accordingly, in September 1993, Fairfax negotiated a sixth extension, through January 15, 1994 with the option of an additional six-month extension through July 15, 1994, on the basis that it was working to organize a REIT to pay off the loan. Tr. 1175-76, 1235. Significantly, Chemical Bank would not have granted the extension but for the prospect of having the loan paid off, and informed Fairfax that it would grant no further extensions. Tr. 1069-70, 1073, 1075. Under these circumstances, Fairfax believed that the only viable course of action to enable it to pay off the loan, preserve value for the partners, and avoid the adverse tax consequences of foreclosure was to transfer the Mall to a REIT. Tr. 1087-88, 1089, 1097, 1129, 1235, 1922-23.

3. *The REIT transaction.* In a July 19, 1993 telephone conversation, Fairfax representatives Paul Mendenhall and Rex Frazier discussed with Smith their efforts to secure additional financing to replace the Chemical Bank loan and the possibility of creating a REIT by pooling several of Fairfax's shopping malls and other commercial properties that would include the Mall. Tr. 263-71, 475-76, 486, 487, 1077-80, 1083-84. In response, Smith expressed concern about what would happen to his interest in the event of such a transaction. Tr. 265. According to Smith, he was told that he would have three options: (1) his interest would be bought out; (2) Fairfax's 85% interest would be contributed to the REIT, making Smith a partner with the REIT; and (3) the entire property would be

contributed to the REIT and he would receive stock in the REIT. Tr. 270-71.

In early September 1993, Fairfax formed JP Realty, Inc., a Maryland corporation, which would be the "trust" entity, and Price Development Company, a Maryland limited partnership, of which JP Realty was the general partner, which would hold the properties. Tr. 496-98. That same month, a registration statement of JP Realty was filed with the Securities and Exchange Commission ("SEC") (Tr. 498), and Fairfax signed two contribution agreements by which the Mall would be transferred to the REIT in exchange for partnership units in Price Development Company at the time of, and conditioned upon, the REIT's closing (P. Exhs. 58, 59; Tr. 284-85, 1092-93, 2020). Fairfax did not talk to Smith with regard to the transfer of the property into the REIT at this time and did not disclose the contribution agreements to the Smiths until April 1994. Tr. 285-86, 513, 360-61, 1994. The registration of the REIT with the SEC also was not disclosed to the Smiths. Tr. 502, 506. It is undisputed, however, that Fairfax relied upon the advice of counsel that the securities laws precluded it from making an earlier disclosure to the Smiths because Mrs. Smith was an "unaccredited investor." Tr. 507, 521, 1103-04, 1233, 1920, 1994-97.

On January 13, 1994, Fairfax sent Smith the final Prospectus for the REIT (Tr. 298), which disclosed that the Mall was to be contributed to the REIT, described the formation of the REIT, and disclosed Fairfax's potential conflicts of interests in and benefits from the REIT (P. Exh. 71; Tr. 1942-59). Although there was testimony that the REIT transaction benefitted both Fairfax and John Price (Fairfax's chairman and CEO) personally (Tr. 899-907), it is undisputed that Fairfax could have gone ahead with the REIT without the Mall (Tr. 1122-23, 1921-22) and that John Price would have received all the benefits of the REIT if the Mall had not been contributed to the REIT (Tr. 1123, 1326-27). Moreover, despite Price's alleged disincentive to sell the Mall due to

adverse tax consequences from a sale (Tr. 1571, 1578, 1988-89), the undisputed testimony was that such consequences were not a consideration during the refinancing process (Tr. 1989), and, in fact, likely would not have even been triggered by a sale (Tr. 2021).

On January 20, 1994, the day before the REIT closed, Fairfax informed Smith that he would receive 13,319 units from the REIT, which at the Prospectus price of $17.50 per unit represented a value of $233,882.50. Tr. 1843, 1998. The value of the REIT was established by underwriters, who determined through due diligence what the public was willing to pay. Tr. 1099, 1249. Fairfax did not seek appraisals of the Mall's fair market value before its contribution to the REIT, based on advice from investment bankers that such appraisals were not necessary. Tr. 1128, 1150. Fairfax also did not seek the Smiths' consent prior to closing the REIT, based on advice of counsel that federal securities laws prevented disclosure of the relevant information to the Smiths and that consent was not required by the partnership agreements. Tr. 502, 1092-94, 1105, 1137-40, 1997.

The REIT went public on January 21, 1994, selling approximately $198 million in stock. In all, 38 properties, including the Mall, were contributed to the REIT in exchange for shares in the REIT. Tr. 1164, 1226-27, 1232. John Price diluted his personal interest by several million dollars to enable the transaction go forward. Tr. 1112. On or before the closing, the schedules to the Contribution Agreement were amended to reflect that the Partnerships had been allocated 20,793 REIT shares: 8,793 shares were allocated to the Partnerships by the underwriters using the standard REIT formula, and 12,000 were personally contributed by John Price to resolve Smith's concern that the REIT value did not reflect the fair market value of his interest in the Mall and to compensate him for his capital contribution of roughly $228,000. P. Exh. 58, Exh. B; Tr. 288-89, 1998-2002. Although this calculation "should have been attached to the contribution agreements" sent to Smith in April

1994 (Tr. 2011), Smith claimed that he did not see the revised accounting until 2000 (Tr. 1868-71).

It is undisputed that the Mall was valued according to traditional REIT standards (Tr. 1294-95), and that the Smiths were treated the same as all other partners in the REIT (Tr. 1114, 1232, 1984), except that the Mall's capitalization rate was decreased, thereby increasing the Mall's value and avoiding a major tax liability (Tr. 1111-12, 1166-67, 1288-90). As a result of the sale of shares in the REIT, the Chemical Bank loan was paid off, thereby eliminating Smith's guarantees on the loan (Tr. 938, 1121, 1948-49), and a portion of the new debt was allocated to the Partnerships to preserve or confer tax advantages, the benefits of which were allocated to the Smiths rather than to other partners in the Partnerships (Tr. 978, 1121-22, 1289-90, 1937).

To assuage Smith's continuing objections to the REIT valuation, on March 8, 1994, Fairfax sent a letter to Smith setting forth an "original computation" and a "revised computation" of the Smiths' interest in the REIT value of the Mall. App., *infra*, 42a-44a. Under the original computation, the Smiths were allocated 1,319 units, reflecting their 15% share of the January 1994 computation of 8,793 units, plus 13,179 additional units from John Price for their capital call, for a total of 14,498 units. *Id.* at 42a. Under the revised computation, the Smiths received 352 units for their 15% interest in the allocation of 2,348 units to the Partnerships. *Id.* at 42a-43a. Fairfax proposed to pay the Smiths $230,640 for their capital contribution, plus 352 units (worth an additional $6,160) established by the revised computation. *Id.* at 43a. The total value of this offer was almost five times higher than the value of the 15% interest in 20,793 units allocated to the Partnerships that Smith claims was not disclosed to him until 2000, which was worth $54,582.50 (3,119 units times $17.50 per unit).

4. *Proceedings below.* The Smiths retained counsel in June 1994 to bring suit (Tr. 364), and the case proceeded to trial in March 2001 on claims for breach of fiduciary duty, breach of contract, and conversion. At trial, the Smiths' appraisal expert John Howden testified that the fair market value of the Mall as of January 1, 1994, was $16 million and that the Mall could have sold for that sum to a willing buyer had it been left on the market for one year (Tr. 626, 673) — a period of time not available to Fairfax under the conditions of the sixth extension. Howden acknowledged, moreover, that when making his appraisal he was unaware that Fairfax had been attempting to locate a buyer for the Mall without success, and did not consider whether the Mall would be able to obtain long-term financing. Tr. 670-71, 673, 674.

Relying on Howden's appraisal, the Smiths' damages expert Merrill Norman testified that, if the Mall had been sold at fair market value, the Smiths would have received repayment of their capital call ($228,390) with interest, repayment of their capital contribution of water rights ($30,000), and 15% of the remaining proceeds as repayment of the balance of their capital ownership interest ($149,004), resulting in a total of $407,394. Tr. 805-12, 860-66. Norman then calculated compound prejudgment interest as follows: $443,023 of interest on the $228,390 capital contribution since 1990, and $154,198 in prejudgment interest on the value of the Smiths' 15% remaining equity interest, for a total prejudgment interest claim of $597,221. App., *infra*, 45a-47a. Norman admitted that he did not know whether the Mall would have been lost to foreclosure had it not been contributed to the REIT, whether Chemical Bank would have refused to grant additional extensions of the loan, or whether the Partnerships could have obtained money to pay off the Chemical Bank loan had it gone into default. Tr. 917, 943, 945.

In the first phase of the trial, the jury returned a special verdict finding that Fairfax had breached the partnership agreements, breached its fiduciary duty to the Smiths, and

converted property belonging to the Smiths. App., *infra*, 27a-28a. The jury awarded the Smiths damages of $410,000 for these claims and prejudgment interest of $690,000, which was $92,000 more than the amount of prejudgment interest calculated by Norman. *Id.* at 28a. In the second phase of the trial, the jury imposed punitive damages of $5.5 million. *Id.* at 29a. The trial court entered judgment on this verdict and awarded the Smiths attorneys' fees and costs in the amount of almost $525,000. *Id.* at 30a-33a.

The trial court denied Fairfax's post-trial motions and entered "special findings of fact" with regard to the punitive award as required by state law. In its special findings, the court determined that "[t]he jury could have found by clear and convincing evidence a pattern of deceit, failure to disclose and misrepresentation with respect to the three 'options' which [Fairfax] personnel discussed with Armand Smith relative to formation by [Fairfax] of a real estate investment trust." App., *infra*, 35a. In support of this conclusion, the court stated that there was "substantial evidence" that:

- Fairfax delayed disclosing to the Smiths the contribution agreements conveying the Mall to the Price Development Company for the benefit of the JP Realty REIT and the resulting unavailability of the three options that Fairfax originally gave them regarding how their interests would be handled in a REIT transaction until several months after the fact;
- Fairfax's March 1994 "revised calculation" of the Smiths' interest in the REIT value of the mall was "intentionally misleading";
- Fairfax failed to provide an accurate accounting of that interest until 2000, after nearly six years of litigation; and
- Fairfax paid excessive fees to itself as general partner, commingled funds from different properties, and accrued

interest to itself on its own capital contributions, while denying the Smiths similar treatment.

Id. at 35a-37a. The court concluded that the punitive award "was within the zone of reasonableness given the conduct of [Fairfax] and the circumstances of the case and clearly was not excessive or disproportionate as to suggest or evidence passion or prejudice of the jury." *Id.* at 38a.

The Utah Supreme Court affirmed in part, remitted in part, and remanded. The court began its opinion by reciting the facts in the light most favorable to the plaintiffs. App., *infra*, 2a-5a. After determining first that prejudgment interest is an available remedy under Utah law and then ordering a remittitur of the jury's $690,000 award of prejudgment interest to $597,221, the figure calculated by Norman (*id.* at 7a-13a), the court turned to the punitive damages. "[R]eview[ing] the record in the light most favorable to the Smiths," the court found "more than sufficient evidence to support the [trial] court's submission of the punitive damages question to the jury." *Id.* at 14a. Though purporting to review petitioners' challenge to the amount of the punitive award *de novo* (*id.* at 16a), the Utah Supreme Court proceeded to defer to the trial court's finding that the jury "'could have found'" that Fairfax engaged in "'a pattern of deceit, failure to disclose and misrepresentation,'" which, it concluded, "support[s] a substantial award of punitive damages." *Id.* at 19a-20a. It then observed that the approximately 5.5:1 ratio between the punitive award and the reduced compensatory award was "well within the single-digit ratio discussed in" *State Farm*. *Id.* at 24a. It accordingly upheld the $5.5 million dollar punishment in its entirety.

REASONS FOR GRANTING THE PETITION

A. Review Is Necessary To Supply Lower Courts With Further Guidance Regarding The Ratio Guidepost.

In *State Farm*, this Court recognized the need to give lower courts additional guidance as to the proper application of the

ratio guidepost. Departing from its past practice of saying little more than that "a general concern of reasonableness . . . properly enters into the constitutional calculus" (*BMW*, 517 U.S. at 583 (internal quotation marks, alterations, and citations omitted)), the Court provided the broad contours of a framework for determining the constitutionally permissible range of ratios in a particular case.

To begin with, the Court explained, "[o]ur jurisprudence and the principles it has now established demonstrate * * * that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 123 S. Ct. at 1524. The Court went on to remind lower courts that in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1 (1991), it had indicated that a punitive award of four times compensatory damages "might be close to the line of constitutional impropriety" and that in *BMW* it "cited that 4-to-1 ratio again" and "further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish." *Ibid.*[4] The Court reiterated its observation in *BMW* that "ratios greater than those we have previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages." *Ibid.* (internal quotation marks omitted). But it then went on to add that "[t]he converse is also true * * *. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limits of the due process guarantee." *Ibid.*

Applying these guidelines to the facts of the case before it, the Court observed that the $1 million compensatory award for emotional distress sustained by the plaintiffs for the year and a

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[4] We note in passing that, although double, treble, and quadruple damages correspond to punitive/compensatory ratios of 1:1, 2:1, and 3:1, most lower courts mistakenly have equated them with ratios of 2:1 to 4:1.

half that State Farm left them subject to an "excess verdict" was "substantial" and constituted "complete compensation." *Ibid.* The Court further noted that those damages embodied a punitive component. *Id.* at 1526. For these reasons, it concluded that, even though the defendant's conduct was "reprehensible" and "merit[ed] no praise" (*id.* at 1521), "a punitive award at or near the amount of compensatory damages" — *i.e.*, a 1:1 ratio — was likely the constitutional maximum. *Id.* at 1526.

In the aftermath of *State Farm*, most lower courts have taken to heart the Court's admonition that, except when the compensatory damages are small and the conduct is egregious, double-digit ratios will rarely be constitutional. At the same time, however, many courts have assumed that single-digit ratios are immune from constitutional scrutiny, notwithstanding this Court's statement that the 700-year legislative history of 1:1 to 3:1 ratios is "instructive." Moreover, the Court's statement that, when compensatory damages are substantial, a 1:1 ratio may be the constitutional maximum, has been all but ignored.

The present case is illustrative. The Utah Supreme Court cited *State Farm*'s directives that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process" and that "[s]ingle-digit multipliers are more likely to comport with due process" before perfunctorily concluding that the 5.5:1 ratio before it was "well within the single-digit ratio discussed" by *State Farm*. App., *infra*, 23a-24a. The Utah Supreme Court paid lip service to *State Farm*'s observation that a 4:1 ratio "might be close to the line of constitutional impropriety" (*id.* at 23a), but without explanation failed even to reduce the punitive award to that limit. And despite the fact that the plaintiffs in this case sustained solely economic harm for which they received compensatory damages in excess of $1 million (plus another $525,000 in attorneys fees' and costs), the Utah Supreme Court omitted any mention of *State Farm*'s clearly

pertinent admonition that a 1:1 ratio may be the constitutional maximum when compensatory damages are substantial.[5]

Regrettably, the Utah Supreme Court is far from the only lower court that has treated this Court's pronouncements about the historical tradition of single, double, and treble damages as mere background and ignored entirely the Court's statement that a 1:1 ratio might be the constitutional maximum when the compensatory damages are substantial. For example, in one of the first post-*State Farm* decisions, the Eleventh Circuit acknowledged that $500,000 emotional distress awards to each of seven white librarians who allegedly were victimized by reverse discrimination were "substantial," but nonetheless upheld punitive awards against three individual defendants that were between four and five times the compensatory damages allocated to those defendants. *Bogle* v. *McClure*, 332 F.3d 1347, 1362 (11th Cir. 2003), petition for cert. pending, No. 03-623. Without making any inquiry into the extent to which the compensatory awards adequately satisfied the federal interests in deterrence and punishment or explaining why the

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[5] The $1 million compensatory award was "substantial" by any objective measure and indisputably constituted complete compensation for respondents' economic injuries, as it included their 15% interest in the partnerships, their capital contributions, and interest accruing from the time the Mall was transferred to the REIT in January 1994 to the time of trial in March 2001. App., *infra*, 45a-47a (Norman calculation of damages). In fact, because prejudgment interest is limited under Utah law to cases in which damages are complete and readily ascertainable (*id.* at 11a), it is properly considered to be extra-compensatory and to contain a punitive element, much like the compensatory award for emotional distress in *State Farm*. Moreover, not only did the award of attorneys' fees make respondents whole, it too served deterrent and punitive functions. See *Smith* v. *Wade*, 461 U.S. 30, 94 (1983) (O'Connor, J., dissenting) ("awards of compensatory damages and attorney's fees already provide significant deterrence"). Under these circumstances, the only justifiable punitive award was one "at or near the amount of compensatory damages." *State Farm*, 123 S. Ct. at 1526.

defendant's conduct was materially more reprehensible than the conduct at issue in *State Farm*, the Eleventh Circuit stated that the approximately 4:1 aggregate ratio was within "a range which the Supreme Court has found to be 'instructive,'" and therefore held that the ratio "does not indicate that the punitive damages award violates due process." *Ibid.*

Similarly, in a case alleging employment discrimination on the basis of ethnicity and national origin, the Ninth Circuit upheld a $2.6 million punitive award that was over seven times the $360,000 compensatory award for economic loss and emotional distress. *Zhang* v. *Am. Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003), petition for cert. pending, No. 03-944. Focusing solely on the Court's observation that single-digit multiples are more likely to pass constitutional muster than higher ratios, the Ninth Circuit concluded that the 7.2:1 ratio before it "is not constitutionally excessive." *Id.* at 1044. Essentially reading the Court's statement that the long history of double, treble, and quadruple damages remedies is "instructive" and its admonition that a 1:1 ratio may be the constitutional maximum when compensatory damages are substantial out of the opinion, it explained:

> This is of course a single-digit ratio, far below the ratios at issue in *BMW*, *Cooper Industries*, and *State Farm*. We are aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages, and we decline to extend the law in this case.

Ibid.

And in a case that this Court vacated and remanded for further consideration in light of *State Farm*, the Federal Circuit held that *State Farm* did not require it to reduce a $50 million punitive award that was more than three times the compensatory damages the court regarded to have arisen out of the business tort committed by the defendant. *Rhone-Poulenc Agro, S.A.* v. *DeKalb Genetics Corp.*, 345 F.3d 1366 (Fed. Cir.

2003). The Federal Circuit's explanation well demonstrates why this Court's further guidance on ratios is so necessary. Focusing entirely on this Court's statements that few ratios exceeding single digits will pass constitutional muster and that a ratio of more than 4:1 may be close to the line — and ignoring entirely the Court's reference to the long history of double, treble, and quadruple damages remedies and its observation that a 1:1 ratio may be the constitutional maximum when compensatory damages are substantial (as they undeniably were in the case before it) — the Federal Circuit stated:

> In this case, the proportion of punitive damages to compensatory damages does not even approach the possible threshold of constitutional impropriety. The $50 million punitive award is barely above three times the compensatory award of $15 million in this case. That ratio remains within the "[s]ingle-digit multipliers [which] are more likely to comport with due process," not even reaching the 4-to-1 ratio mentioned by the Court as a threshold where the punitive award may become suspect.

Id. at 1371-72 (alterations in original; citation omitted).

Indeed, of the 23 post-*State Farm* cases (in addition to this one) in which compensatory awards (or potential harm) have exceeded $200,000, in ***only one*** case has a reviewing court construed *State Farm*'s ratio analysis to necessitate a reduction to roughly a 1:1 ratio.[6] See *TVT Records* v. *Island Def Jam Music Group*, 279 F. Supp. 2d 413 (S.D.N.Y. 2003). In that case, the trial court observed that "the Supreme Court's instructions on [the ratio] point still appear somewhat imprecise" and characterized the guidance given by the Court on ratios as "still formative." *Id.* at 449-50. Nevertheless, unlike the Utah Supreme Court, the *TVT* court found "[m]ost

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[6] Our survey is limited to decisions that are accessible through electronic databases.

compelling" this Court's "instructions concerning the relative size of the compensatory damages verdict." *Id.* at 450. Concluding that the nearly $24 million in compensatory damages was both "substantial" and "complete compensation" for the plaintiff's injury, the district court held that "any punitive recovery beyond [the amount of the compensatory damages] would be more than necessary to achieve the level of retribution and deterrence appropriate to this case * * *." *Id.* at 450-51.

Aside from *TVT*, no other court confronted with a compensatory award of $200,000 or higher has ordered a remittitur to 1:1 or below, and most courts have treated either 9:1 or 4:1 as a constitutional free pass. See, *e.g.*, *Greenberg* v. *Paul Revere Life Ins. Co.*, 2004 WL 74630, at *2 (9th Cir. Jan. 12, 2004) (concluding that "[t]he 4.4:1 ratio between the compensatory and punitive awards in this case is similar to the 4:1 ratio in *BMW* and well within the 'single digit ratio' that marks the outer limits of permissible disparities" where compensatory damages were $547,445.42); *Advocat* v. *Sauer*, 111 S.W.3d 346, 361, 363 (Ark.) (focusing exclusively on Court's references to single-digit and 4:1 ratios, and holding that a 4.2:1 ratio was constitutionally "reasonable" where compensatory damages were $5 million), cert. denied, 124 S. Ct. 535 (2003); *Henley* v. *Philip Morris Inc.*, 2004 WL 79075, at *32 (Cal. Ct. App. Jan. 20, 2004) (stating that "where a plaintiff has been fully compensated with a substantial compensatory award, any ratio over 4 to 1 is 'close to the line'" and reducing ratio from 16.7:1 to 6:1 where compensatory damages were $1.5 million); *Diamond Woodworks, Inc.* v. *Argonaut Ins. Co.*, 135 Cal. Rptr. 2d 736, 762 (Cal. Ct. App. 2003) (concluding that *State Farm*, *BMW*, and *Haslip* suggest that in run-of-the-mill case the outer limit of constitutionally permissible punitive damages is four times compensatory damages, and reducing ratio from 21.3:1 to 3.9:1 where compensatory damages were $258,570); *Bocci* v. *Key Pharms., Inc.*, 76 P.3d 669, 674-76 (Or. Ct. App.) (focusing exclusively

on Court's references to single-digit and 4:1 ratios; stating that 4:1 "apparently is something of a benchmark for the United States Supreme Court," and reducing 45:1 ratio to 7:1 where compensatory damages were $500,000), modified on recons., 79 P.3d 908 (Or. Ct. App. 2003); *Reading Radio, Inc.* v. *Fink*, 833 A.2d 199, 215 n.3 (Pa. Super. 2003) (perfunctorily concluding that 2.7:1 ratio does not violate due process in light of *State Farm*'s statement on single-digit ratios, where compensatory damages were $300,000); *Haggar Clothing Co.* v. *Hernandez*, 2003 WL 21982181, at *7 (Tex. Ct. App. Aug. 1, 2003) (unpublished) (focusing exclusively on Court's reference to single-digit ratios in upholding 6.7:1 ratio where compensatory damages were $210,000), petition for review filed (Sept. 30, 2003); *McClain* v. *Metabolife Int'l, Inc.*, 259 F. Supp. 2d 1225, 1231 (N.D. Ala. 2003) (stating that "a multiplier of 9 or less means that the punitive damages presumptively passes [sic] muster under the Due Process Clause" and concluding that $1 million punitive award that was twice the plaintiff's compensatory damages "easily meets the ratio test").[7]

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[7] See also *Interclaim Holdings Ltd.* v. *Ness, Motley, Loadholt, Richardson & Poole*, 2004 WL 61114, at *18 (N.D. Ill. Jan. 8, 2004) (concluding that approximately 3.4:1 ratio was "well within the constitutional guidelines set forth by the Court" where compensatory damages were $8.3 million); *S. Union Co.* v. *S.W. Gas Corp.*, 281 F. Supp. 2d 1090, 1099-1105 (D. Ariz. 2003) (concluding that 154:1 ratio did not render punitive award unconstitutionally excessive in light of court's belief that $390,073 compensatory award understated damage done by defendant public official to the public trust); *Eden Elec., Ltd.* v. *Amana Co., L.P.*, 258 F. Supp. 2d 958, 972-75 (N.D. Iowa. 2003) (reducing 8.5:1 ratio to approximately 4.76:1 in business tort case in which plaintiff received "a substantial compensatory damages award" of $2.1 million); *Simon* v. *San Paolo U.S. Holding Co.*, 7 Cal. Rptr. 3d 367, 391 (Cal. Ct. App. 2003) (finding 4.3:1 ratio of punitive damages to $400,000 in potential harm not to be indicative of excessiveness because, "[e]ven if *State Farm* had imposed a 'bright-line' ratio, 4 to 1 would be 'close to the line of

Because "[t]he precise [punitive] award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff" (*State Farm*, 123 S. Ct. at 1524), it is not surprising that lower courts have reached different results in applying the ratio guidepost. But the near universal focus of the lower courts on the Court's references to single-digit and 4:1 ratios — and near universal disregard of its statement that a 1:1 ratio may be the constitutional maximum when compensatory damages are substantial — is much harder to comprehend. As the district court observed in *TVT*, the guidance provided in *State Farm* is "still formative." Further guidance is plainly needed both to

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constitutional impropriety,' but not presumptively unconstitutional"); *Romo* v. *Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 812 (Cal. Ct. App. 2003) (deeming a 3:1 ratio of compensatory damages to be constitutionally permissible in products-liability case in which surviving family members received almost $4.6 million in compensatory damages); *Taylor Woodrow Homes, Inc.* v. *Acceptance Ins. Cos.*, 2003 WL 21224088, at *4 (Cal. Ct. App. May 28, 2003) (unpublished) (reducing 17.1:1 ratio to 3.4:1, where compensatory damages were $293,000, despite concluding that "[t]he facts here are not as bad as they were in *State Farm*"); *Borne* v. *Haverhill Golf & Country Club, Inc.*, 791 N.E.2d 903, 916 (Mass. Ct. App.) (invoking Court's statement that single-digit multipliers are more likely to comply with due process in upholding aggregate ratio of 3.4:1 where aggregate compensatory damages were $424,000), review denied, 795 N.E.2d 573 (Mass. 2003); *Gallegos* v. *Elite Model Mgmt. Corp.*, 2004 WL 51604, at *5 (N.Y. Sup. Ct. Jan. 6, 2004) (perfunctorily concluding that 2.4:1 ratio of punitive damages to $1.1 million award for pain and suffering "fully satisfied due process"); *Trinity Evangelical Lutheran Church & Sch.–Freistadt* v. *Tower Ins. Co.*, 661 N.W.2d 789, 803 (Wis. 2003) (implicitly concluding that 7:1 ratio of punitive damages to $490,000 in potential harm was not suggestive of an excessive punishment), cert. denied, No. 03-502 (Dec. 8, 2003); cf. *DiSorbo* v. *Hoy*, 343 F.3d 172, 188-89 (2d Cir. 2003) (ordering remittitur of $1.275 million punitive award to $75,000, where compensatory damages were $250,000, based on comparison with other police brutality verdicts).

clarify that, in admonishing that a 1:1 ratio may be the constitutional maximum when compensatory damages are substantial, the Court meant what it said, and to assist lower courts in identifying circumstances under which a departure from that benchmark is permissible.

B. The Lower Courts Are Systematically Misapplying *BMW*'s Reprehensibility Guidepost By Deferring To Phantom Factual Findings Never Made By The Jury Rather Than Independently Gauging The Degree Of Reprehensibility Of The Defendant's Conduct.

The present case also is an ideal vehicle for addressing a second critical issue that has confounded the lower courts — how the requirement of *de novo* appellate review applies to the determination of the degree of reprehensibility of the defendant's conduct. This is a threshold question that arises in every case in which a reviewing court is tasked with evaluating an excessiveness challenge to a punitive award. And the answer to the question is very often determinative of the outcome of the reviewing court's excessiveness review. Accordingly, it is critical that the Court resolve the issue decisively once and for all.

1. In *Cooper Industries*, the Court held that appellate courts must conduct a *de novo* review of trial courts' application of the three *BMW* excessiveness guideposts (532 U.S. at 436), a mandate it recently reiterated in *State Farm* (123 S. Ct. at 1520). In so holding, the Court observed that "[e]xacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice." *Id.* at 1520-21 (internal quotation marks omitted). In neither *Cooper Industries* nor *State Farm*, however, did the Court instruct lower courts as to the meaning of "exacting" review in the context of determining whether the punishment is commensurate with the degree of reprehensibility of the conduct. A division in the lower courts has ensued.

The Ninth Circuit has stated that, although "[o]rdinarily appellate courts must defer to juries," "a hands-off appellate deference to juries, typical of other kinds of cases and issues, is unconstitutional for punitive awards." *In re Exxon Valdez*, 270 F.3d 1215, 1238-39 (9th Cir. 2001). On the other hand, most other reviewing courts have applied the standard of review used to test the sufficiency of evidence for a liability finding — taking the evidence in the light most favorable to the plaintiff, assuming the existence of any fact asserted by the plaintiff so long as the record contains "substantial evidence" to support it, and giving the plaintiff the benefit of all conceivable inferences supporting a finding of high reprehensibility — rather than independently gauging the degree of reprehensibility of the defendant's conduct.

The decision below is emblematic of this deferential approach. The Utah Supreme Court noted at the outset of its excessiveness review that it was applying a *de novo* standard of review. App., *infra*, 16a & n.13. Yet in analyzing the nature of Fairfax's misconduct — the state-law factor that "parallels" the reprehensibility guidepost (*id.* at 18a) — the court deferred to the trial court's "special findings stating that 'the jury ***could have found by clear and convincing evidence*** a pattern of deceit, failure to disclose and misrepresentation.'" *Id.* at 19a (emphasis added). Each of those special findings was premised solely on the existence of "substantial evidence" to support it (*id.* at 35a), not on an independent assessment of the evidence. Indeed, the Utah Supreme Court itself embraced the language of sufficiency-of-the-evidence review, stating that "***substantial evidence*** was presented at trial that [Fairfax] did not want the Smiths to interfere with the REIT's formation by filing an adverse claim or a lawsuit prior to January 1994 when the REIT went public." *Id.* at 20a (emphasis added).

The Utah Supreme Court's incorporation of a liability-type standard into the excessiveness analysis is far from unique. See, *e.g.*, *Bogle*, 332 F.3d at 1361 ("***A reasonable jury could have concluded from the evidence*** that Appellants knew that

transferring the Librarians on the basis of race was illegal, were warned not to make the transfers, and knew that other Fulton County officials had been caught and punished for making employment decisions on the basis of race * * *.") (emphasis added); *Romo*, 6 Cal. Rptr. 3d at 806 & n.8 (rejecting defendants' argument that *State Farm* requires a court "either to reevaluate the evidence or to accept only 'the core facts of the case that the jury *had to find* in order to return a punitive damage verdict against the defendant'" and concluding that "[s]ubstantial evidence supports the jury's implicit conclusion that Ford acted with malicious conduct under aggravated circumstances") (emphasis in original); *Diamond Woodworks*, 135 Cal. Rptr. 2d at 761 ("[W]e are compelled to observe that a jury did, in fact, determine Argonaut's conduct to be fraudulent and reprehensible and deserving of significant punitive damages. Neither the Constitution nor the *Campbell* court's interpretation of the due process clause requires us wholly to ignore the determination of the jury * * *."); *Waddill* v. *Anchor Hocking, Inc.*, 78 P.3d 570, 574 (Or. Ct. App. 2003) ("[D]efendant fails to recognize that the jury decided the case in plaintiff's favor and that, as a result, ***we must resolve all disputed facts in favor of plaintiff***.") (emphasis added).

2. This "hands-off appellate deference to juries" (*Exxon Valdez*, 270 F.3d at 1239) when determining the degree of reprehensibility of a defendant's conduct is impossible to square with this Court's precedents. In *BMW*, for example, an Alabama jury found that the defendant committed fraud and also found, by clear and convincing evidence, the prerequisite for imposition of punitive damages — that the fraud was "'gross, oppressive or malicious.'" *BMW*, 517 U.S. at 565 (quoting Ala. Code § 6-11-20). Notwithstanding that jury finding, the Court independently evaluated the degree of reprehensibility of the defendant's conduct, concluding that "none of the aggravating factors associated with particularly reprehensible conduct [was] present." *Id.* at 576. The Court emphasized that the jury's finding of the conduct necessary for

punitive liability was entirely irrelevant to the excessiveness analysis, stating:

> We accept, of course, the jury's finding that BMW suppressed a material fact which Alabama law obligated it to communicate to prospective purchasers of repainted cars in that State. * * * That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages[, however,] does not establish the high degree of culpability that warrants a substantial punitive damages award.

Id. at 579-80. See also *id.* at 585 ("[W]e of course accept the Alabama courts' view that the state interests in protecting its citizens from deceptive trade practices justifies a sanction in addition to the recovery of compensatory damages. We cannot, however, accept the conclusion of the Alabama Supreme Court that BMW's conduct was sufficiently egregious to justify a punitive sanction that is tantamount to a severe criminal penalty.").

In *Cooper Industries*, the Court expressly held that appellate review of a trial court's application of the *BMW* guideposts is *de novo*. In the course of so holding, it indicated that reviewing courts must accept "***specific*** findings of fact" by the jury (532 U.S. at 439 n.12 (emphasis added)), thereby implying that, in the absence of such findings, reviewing courts must decide for themselves whether the aggravating factors characteristic of highly reprehensible conduct are present. And in *State Farm*, the Court reiterated the importance of "[e]xacting appellate review" (123 S. Ct. at 1520), giving no indication that this critical constitutional requirement can be satisfied by application of a sufficiency-of-the-evidence type standard.

3. To the contrary, in the absence of specific factual findings that can be reviewed deferentially, a sufficiency-of-the-evidence standard is inconsistent both with the law/fact

distinction the Court drew in *Cooper Industries* and with the procedural due process concerns it expressed in *State Farm*. That is because neither a jury's finding of the conduct necessary for punitive liability nor the amount of punitive damages the jury elects to impose supplies any indication of its assessment of the ***degree*** of reprehensibility of the defendant's conduct. Indeed, the jury's function in setting the amount of punitive damages does not typically involve determining whether any particular fact has been proven. Upon reaching the punishment-setting stage, the jury generally is not instructed that it must find particular facts and rarely is asked to return a special verdict answering specific factual questions bearing on the degree of reprehensibility of the defendant's conduct. Instead, juries typically are told little more than that they have discretion in setting the amount of punitive damages and that the purposes of punitive damages are to deter and punish.[8] In short, the jury essentially is asked to make an impressionistic judgment about the amount of punishment to exact. The resulting verdict is the legal equivalent of an ink blot, subject to any number of possible interpretations.

It follows that the standard for reviewing the amount of punitive damages should be substantially different from the standard that applies to sufficiency challenges to liability determinations. Because it is not possible to tell what facts (if

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[8] For example, the jury in this case was instructed:

> In awarding punitive damages in this case, you may award such sum as, in your judgment, would be reasonable and proper as punishment to the defendants for such wrongs that you have found, and as a wholesome warning to others not to offend in like manner.
>
> Punitive damages should be awarded with caution, and you should keep in mind that they are only for the purpose just mentioned, and are not for the measure of actual damages.

Tr. 2169.

any) the jury found in setting an amount of punitive damages or what relative weight it gave to any facts that may have been found, application of a sufficiency-of-the-evidence standard (as both reviewing courts did here) would result in deference being given to what are in reality phantom factual determinations, which in turn results in "false positive" determinations of high reprehensibility. This concern is more than hypothetical. In most cases in which a large punitive award is imposed against a wealthy company, the plaintiff's counsel argues both that the conduct was egregious and that the punitive damages must be significant in relation to the defendant's net worth (or some similar measure of wealth) in order to accomplish the deterrent function.[9] It is impossible to tell from the mere fact that the jury returned a multi-million dollar punitive verdict whether the jury actually accepted any of the inferences urged on it by the

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[9] This case is no exception. During closing arguments, plaintiffs' counsel told the jurors that "you have now seen what Price Development's wealth is [over $37 million] and how it is used and how it is operated" and then proceeded to ask rhetorically:

> What is the sum that will send this message to everybody, but particularly to Price Development Company? Is it $1 million or $2 million? I submit that that doesn't began to touch it. That may just simply, in their minds, it might justify what they have done, they can probably do it again. It has got to be something that is far beyond what the actual damages are that you have found yourself. A lesson and a message. $5 million? Possibly. $8 million to $10 million, probably?

Tr. 2171-72. In view of that exhortation, there is no basis for assuming that, in assessing a punitive award of $5.5 million (a figure right around the number suggested by counsel as "possibly" being sufficient to deter), the jury regarded Fairfax's conduct to be especially reprehensible, much less that it found Fairfax to have committed each of the acts of alleged misconduct relied upon by the Utah Supreme Court in concluding that "[Fairfax's] actions * * * support a substantial award of punitive damages" (App., *infra*, 19a-20a).

plaintiff's counsel or instead believed that, in view of the substantiality of the defendant's financial resources, a multimillion dollar award constituted modest punishment for conduct of modest reprehensibility.

4. The difference between deferring to a jury's finding of punitive liability and conducting a true *de novo* review of the degree of reprehensibility of the defendant's conduct is readily apparent in this case. Any court undertaking a searching review of the evidence would have to conclude that Fairfax's conduct did not come anywhere close to the level of reprehensibility necessary to support a $5.5 million punitive award (almost three times the amount this Court deemed in *BMW* to be "tantamount to a severe criminal penalty" (517 U.S. at 585)). The gist of the harm sustained by the Smiths is that they were not informed of the contribution agreements conveying the mall property to the REIT and of the resulting unavailability of the three options that Fairfax originally gave them regarding how their interests would be handled in a REIT transaction until several months after the fact.[10] Fairfax's failure to disclose this information, however, was the result of the advice of counsel, not intentional malice, trickery, or deceit.[11]

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[10] It is notable in this regard that the Utah Supreme Court observed that "[r]easonable minds could disagree as to whether the Smiths' interests in the mall had value outside of the REIT and therefore whether the Smiths were damaged by [Fairfax's] breach of contract, breach of fiduciary duty, and conversion." App., *infra*, 7a. Because both Utah courts applied the deferential sufficiency-of-the-evidence standard, neither attempted to resolve this disagreement when determining the degree of reprehensibility of Fairfax's tort.

[11] The Utah Supreme Court rejected Fairfax's reliance on advice of counsel on the ground that "substantial evidence was presented at trial that [Fairfax] did not want the Smiths to interfere with the REIT's formation by filing an adverse claim or a lawsuit prior to January 1994 when the REIT went public." App., *infra*, 20a. There

The other indicia of reprehensibility pointed to by the Utah Supreme Court also fail to hold up under the kind of exacting review dictated by this Court's precedents. The March 8, 1994 letter setting forth original and revised computations of the Smiths' interests in the REIT was far from "intentionally misleading" (App., *infra*, 19a); at worst it was a confusing account of REIT computations that did not injure the Smiths in any way, and in fact, offered them a significantly greater sum than the computation attached to the contribution agreements to which they claim entitlement. Moreover, contrary to the Utah Supreme Court's supposition (*ibid.*), there is no evidence that Fairfax intentionally withheld the accurate accounting until six years of litigation had passed; rather, the undisputed testimony is that this calculation was inadvertently omitted from the contribution agreements sent to Smith in April 1994. Finally, the alleged self-interest of Fairfax in entering into the REIT transaction (*id.* at 20a) is irrelevant to whether its conduct was reprehensible because it is undisputed that the REIT could have proceeded without the Mall, that the benefits of the REIT would have accrued to Fairfax and John Price regardless of whether the Mall was contributed, and that tax consequences were not a consideration in the REIT process. Tr. 1122-23, 1326-27, 1921-22, 1989.[12]

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is no evidence in the record to support the court's belief, and, in fact, the evidence compels the exact opposite conclusion. It is undisputed that, over one week prior to the REIT's closing, Fairfax overnighted to Smith a copy of the Prospectus that disclosed virtually all the facts that Fairfax was allegedly keeping secret from the Smiths. Tr. 298. Had the Utah Supreme Court employed "exacting" review, it could not have accepted at face value an assertion about Fairfax's intent that was belied by the evidence of what actually transpired.

[12] The Utah Supreme Court's citation of assorted examples of Fairfax's alleged financial misconduct completely unrelated to the REIT transaction, including payment of excessive fees to itself, commingling of funds, and selective accrual of interest on Fairfax's capital contributions (App., *infra*, 19a) does not stand up to exacting

In short, as this case well demonstrates, the difference between sufficiency-of-the-evidence review and exacting review can be the difference between upholding a multimillion dollar punishment and concluding that "a more modest punishment * * * could have satisfied the State's legitimate objectives" (*State Farm*, 123 S. Ct. at 1521). Because the Utah Supreme Court regrettably is not alone in diluting the constitutionally mandated exacting review by engaging in unwarranted deference to phantom factual findings, review is warranted to clarify that, in the absence of specific jury findings, reviewing courts must determine for themselves whether the evidence establishes the existence of aggravating factors indicative of high reprehensibility.

CONCLUSION

The petition for certiorari should be granted.

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review either. First, the Smiths presented no evidence of the amount of any overcharge of management fees or other claim of injury. Moreover, neither Fairfax nor the Smiths were paid back their capital contributions, or interest thereon, and the accounting entry for interest on Fairfax's capital contribution was later reversed. Tr. 921, 923, 1684-85, 1772-73, 2002-03. Finally, Smith was aware as early as 1990 that Fairfax was combining the Partnerships' bank accounts with the accounts of other Fairfax properties, yet failed to raise an objection. Tr. 224-25, 418-19.

Respectfully submitted.

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JANUARY 2004

APPENDIX A

Armand L. SMITH, individually and as trustee for the Armand L. Smith, Jr., Trust and the Shannon S. Windham Trust, and Virginia L. Smith,
Plaintiffs and Appellees,

v.

FAIRFAX REALTY, INC., formerly Price Development Co., a Utah corporation, North Plains Land Co., Ltd., a Utah limited partnership, and North Plains Development Co., Ltd., a Utah limited partnership,
Defendants and Appellants.

Supreme Court of Utah

Oct. 3, 2003

Affirmed in part, remitted in part, and remanded.

PARRISH, Justice:

¶ 1 This case presents issues relating to the propriety of both compensatory and punitive damage awards. At the conclusion of a jury trial, defendant Price Development Company (Price), a Utah corporation now doing business as Fairfax Realty, Inc., was found liable for conversion, breach of partnership agreements, and breach of fiduciary duties. Plaintiffs Armand and Virginia Smith were awarded compensatory damages, including prejudgment interest, and punitive damages.

¶ 2 On appeal, Price contends that (1) the trial court wrongly denied a directed verdict on the issue of whether Price's actions resulted in any damage to the Smiths; (2) the Smiths were not

entitled to prejudgment interest as part of the compensatory damages; (3) the prejudgment interest award was excessive; (4) the trial court erred in submitting the issue of punitive damages to the jury; and (5) the punitive damage award was excessive. We affirm the trial court on all issues except the excessiveness of the prejudgment interest award.

BACKGROUND

¶ 3 "On appeal, we recite the facts from the record in the light most favorable to the jury's verdict." *Diversified Holdings, L.C. v. Turner*, 2002 UT 129, ¶ 2, 63 P.3d 686 (citation and quotation omitted). In 1984, Price purchased a thirty-three-acre parcel of property in Clovis, New Mexico, from the Smiths. As part of the transaction, the Smiths received a 15% limited partnership interest in each of two partnerships formed to build and operate a shopping mall on the property. Price became the general partner, and the remaining limited partnership interests went to Price and related entities that were under the overall ownership and control of John Price.

¶ 4 Construction of the North Plains Mall was financed through a $9 million loan that was later paid with the proceeds of a $12 million loan. The mall opened in 1985 with approximately forty tenants and thereafter maintained a typical occupancy rate of 93%. Price periodically informed the Smiths that it was pleased with the performance of the mall.

¶ 5 In July 1993, Price informed the Smiths that John Price had decided to form a real estate investment trust (REIT) by pooling shopping malls and other commercial properties owned or controlled by John Price entities. Price wanted to include the North Plains Mall in the REIT and told the Smiths that if the mall were included, the Smiths would have three distinct options for handling their 15% interest in the mall.

¶ 6 Price presented the three options to the Smiths, and the Smiths assumed they had time to consider the options and the potential transfer of the mall. Then, without further communication with the Smiths on the matter, Price proceeded to sign contribution agreements and transfer the mall property into the REIT, despite provisions in the partnership agreements that required the Smiths' consent for such transactions.[1] Preparations were then made to initiate a public stock offering in the REIT.

¶ 7 In the ensuing months, the Smiths repeatedly requested information regarding the status of their interests in the mall, but Price failed to disclose its unilateral decision to contribute the mall property to the REIT. Instead, Price fielded the Smiths' questions regarding the three options previously given to the Smiths, leading them to believe the options were still open, even though Price knew that its unilateral action had left the Smiths with no options. When the Smiths inquired as to the possible value of their holdings should the mall be included in the REIT, Price sent various conflicting estimates, ultimately assigning a total value of just $6,160 to the Smiths' interests. In response, the Smiths presented objections and concerns as to the method used for valuing their interests, the proposed uses of proceeds from the sale of stock, and the costs that could be charged against the value of the mall.[2]

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[1] The partnership agreements required 90% approval of the limited partners before Price, as the general partner, could assign the property for a "non-partnership purpose." The Smiths held 15% and presented evidence at trial that conveyance of the property into the REIT was not a partnership purpose under the agreement. Price has not contested this point on appeal.

[2] Price proposed that $48 million of the money to be raised from the sale of stock in the REIT be used to buy out partnership interests in another mall, with a portion of that expense charged to the North

¶ 8 In April 1994, Price finally disclosed to the Smiths that Price had decided to transfer the mall to the REIT the previous September and that the three options originally presented to the Smiths were no longer available. In fact, the REIT had actually gone public on January 21, 1994, selling approximately $198,000,000 in stock. Proceeds from the public offering were used to pay existing mortgage debt on John Price properties, purchase equity interests in other property, and pay debts and expenses associated with the REIT offering. Evidence at trial showed that the overall transaction substantially benefitted John Price personally, as well as the Price Development Company.

¶ 9 The Smiths brought suit against Price based on the foregoing events and on evidence that Price had acted in other inappropriate, self-interested ways. These other actions included the commingling of funds of multiple Price-related entities, payment of inflated management fees to a Price subsidiary, payment of interest to itself on its capital call contributions while withholding interest from the Smiths' contributions, and possible manipulation of partnership tax returns to the benefit of Price and to the detriment of the Smiths.

¶ 10 After a fourteen-day trial, the jury reached a verdict in favor of the Smiths, finding that Price had breached the partnership agreements, breached its fiduciary duty to the Smiths, and converted partnership assets. The jury awarded the Smiths $410,000 in compensatory damages, which, according to the evidence at trial, was the fair market value of the Smiths'

Plains Mall. In addition, approximately $722,000 in fees incident to the formation of the REIT was to be charged against the value of the mall. The Smiths objected to these items and also contested the use of a "REIT value"—rather than fair market value—for valuing their interests in the mall.

partnership interests in the mall property at the time of the transfer. The jury added $690,000 to the compensatory amount in prejudgment interest. The jury also awarded punitive damages in the sum of $5,500,000 against Price.

¶ 11 Following the verdict, Price brought a number of post-trial motions, including motions for judgment notwithstanding the verdict and for new trial or, in the alternative, for a remittitur. The trial court denied these motions and entered special findings on the punitive damage award pursuant to *Crookston v. Fire Insurance Exchange*, 817 P.2d 789, 811 (Utah 1991) (directing trial judges to articulate grounds for upholding punitive damages when an award exceeds the range of what has consistently been upheld). The special findings upheld the punitive damage award as being "within the zone of reasonableness given the conduct of Price Development and the circumstances of the case."

ANALYSIS

I. DENIAL OF MOTION FOR DIRECTED VERDICT

¶ 12 Price first contends that the district court should have granted its motion for a directed verdict because the Smiths' interests, it argues, were valueless outside of the REIT and Price's actions, therefore, did not result in any damage to the Smiths. "Under Utah law, a party who moves for a directed verdict has the very difficult burden of showing that no evidence exists that raises a question of material fact." *Mahmood v. Ross*, 1999 UT 104, ¶ 18, 990 P.2d 933 (citations and quotation omitted).

> When reviewing any challenge to a trial court's denial of a motion for directed verdict, we review the evidence and all reasonable inferences that may fairly be drawn therefrom in

> the light most favorable to the party moved against, and will sustain the denial if reasonable minds could disagree with the ground asserted for directing a verdict.

Id. at ¶ 16 (citations and quotation omitted). We note here that a more complete marshaling of the evidence by Price would have facilitated our review of this issue. *See Moon v. Moon*, 1999 UT App 12, ¶ 24, 973 P.2d 431 ("'In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists.'" (quoting *W. Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct. App.1991))).

¶ 13 Price argues that had it not transferred the mall property to the REIT, the mall inevitably would have suffered bankruptcy or foreclosure and the Smiths would have recovered nothing for their partnership interests. To this end, Price presented evidence that the mall's $12 million loan, which had been extended six times, had to be repaid by July 15, 1994. According to Price, there were insufficient resources to pay the approximately $11 million balance on the loan by this date, and foreclosure or bankruptcy was therefore imminent. Price also presented evidence that prior to the transfer, which occurred in the fall of 1993, it had made various unsuccessful attempts to refinance or sell the mall, thereby rendering the transfer to the REIT the only viable option. Price argues that this evidence demonstrates that the Smiths could not have received any value for their shares outside of the REIT.[3]

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[3] Price uses the case of *Mahmood v. Ross*, 1999 UT 104, 990 P.2d 933, to characterize this issue as one of proximate causation. The present case, unlike *Mahmood*, does not involve a lengthy or attenuated sequence of events leading to the injury for which the

¶ 14 The Smiths argue that financial failure of the mall was neither inevitable nor imminent. They presented evidence that the outstanding loan could have been extended again as it had been in the past and that Price's efforts to refinance or sell the mall were not exhaustive. The Smiths also produced evidence that Price and John Price had strong financial incentives to contribute the mall to the REIT, rather than committing to sell it on the market. Finally, the Smiths used the testimony of an appraiser to show that their partnership interests had a significant fair market value.

¶ 15 Reviewing the evidence presented by each side and the inferences reasonably drawn therefrom in the light most favorable to the Smiths, we find sufficient evidence to raise a question of material fact on the issue of the mall's valuation. Reasonable minds could disagree as to whether the Smiths' interests in the mall had value outside of the REIT and therefore whether the Smiths were damaged by Price's breach of contract, breach of fiduciary duty, and conversion. Therefore, the district court appropriately denied Price's motion for a directed verdict.

II. PREJUDGMENT INTEREST

¶ 16 Price argues that the trial court improperly allowed an award of prejudgment interest in this case. "A trial court's decision to grant or deny prejudgment interest presents a question of law which we review for correctness." *Cornia v. Wilcox*, 898 P.2d 1379, 1387 (Utah 1995) (citations omitted).

¶ 17 As established nearly a century ago in *Fell v. Union*

Smiths seek to recover. The issue in this case is more accurately characterized as one involving valuation rather than causation.

Pacific Railway Co., Utah courts award prejudgment interest in cases where "damages are complete" and can be measured by "fixed rules of evidence and known standards of value." 32 Utah 101, 88 P. 1003, 1007 (1907); *see also Cornia*, 898 P.2d at 1387; *Bjork v. April Indus. Inc.*, 560 P.2d 315, 317 (Utah 1977). In the present case, the trial judge permitted an award of prejudgment interest based not on the test set forth in *Fell*, but on a prejudgment interest principle recognized in various jurisdictions in breach of fiduciary duty cases.

¶ 18 Some jurisdictions apply the rule that a fiduciary who breaches his duties should not be allowed to benefit from his misconduct and therefore must account for interest on any money or property the fiduciary misappropriated.[4] Following this principle, the trial judge instructed the jury that if Price were found liable for breach of fiduciary duty, the Smiths would be entitled to an interest award measured from the date of the breach.

¶ 19 This court has never decided whether to adopt the principle that prejudgment interest is always appropriate in breach of fiduciary cases. We need not make the decision in this case, however, because we find that the prejudgment interest awarded was appropriate under the *Fell* standard.

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[4] *See, e.g.*, *Josephson v. Marshall*, 2002 WL 1315604, at *4, 2002 U.S. Dist. LEXIS 10741, at *12 (S.D.N.Y. June 14, 2002) (applying New York law); *McDermott v. Party City Corp.*, 11 F. Supp.2d 612, 633 (E.D. Pa.1998) (applying Pennsylvania law); *Nordahl v. Dep't of Real Estate*, 48 Cal. App. 3d 657, 121 Cal. Rptr. 794, 798-99 (1975); *In re Estate of Wernick*, 151 Ill. App. 3d 234, 104 Ill. Dec. 486, 502 N.E.2d 1146, 1154 (1986), *rationale aff'd*, 127 Ill.2d 61, 129 Ill. Dec. 111, 535 N.E.2d 876 (1989); *see also* Restatement of Restitution §§ 156, 157 (1937).

¶ 20 In *Fell*, this court stated:

> The true test to be applied as to whether interest should be allowed before judgment in a given case or not is, therefore, not whether the damages are unliquidated or otherwise, but whether the injury and consequent damages are complete and must be ascertained as of a particular time and in accordance with fixed rules of evidence and known standards of value, which the court or jury must follow in fixing the amount, rather than be guided by their best judgment in assessing the amount to be allowed for past as well as for future injury, or for elements that cannot be measured by any fixed standards of value.

88 P. at 1007.[5] Thus, we do not require that damages necessarily be liquidated, but we deny awards of prejudgment interest in cases where damage amounts are to be determined by the broad discretion of the jury. "In all personal injury

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[5] In later Utah cases, the test has been recited as follows:

> Where the damage is complete and the amount of the loss is fixed as of a particular time, and that loss can be measured by facts and figures, interest should be allowed from that time . . . and not from the date of judgment. On the other hand, where the damages are incomplete or cannot be calculated with mathematical accuracy, such as in the case of personal injury, wrongful death, defamation of character, false imprisonment, etc., the amount of the damages must be ascertained and assessed by the trier of fact at the trial, and in such cases prejudgment interest is not allowed.

Cornia, 898 P.2d at 1387; *Consolidation Coal Co. v. Utah Div. of State Lands & Forestry*, 886 P.2d 514, 523-24 (Utah 1994); *Bjork*, 560 P.2d at 317.

cases,[6] cases of death by wrongful act, libel, slander, false imprisonment . . . and all cases where the damages are incomplete and are peculiarly within the province of the jury to assess at the time of the trial, no interest is permissible." *Id.* at 1006.

¶ 21 This court concluded, in two of the first cases interpreting *Fell*, that fair market valuations of real property are within the category of damages upon which prejudgment interest may properly be awarded. *See San Pedro, Los Angeles & Salt Lake R.R. Co. v. Bd. of Educ.*, 35 Utah 13, 99 P. 263 (1909); *Kimball v. Salt Lake City*, 32 Utah 253, 90 P. 395 (1907). Both *San Pedro* and *Kimball* involved damages in the form of diminution of value to real property. In *San Pedro*, a railroad company reduced the value of school property by its plan to construct a railroad track adjacent to the property. In *Kimball*, a city reduced the value of a residential property by changing the street grade in front of the property. In both cases, the jury was asked to determine the amount of diminution in the fair market value of the relevant property based on the evidence presented. Prejudgment interest was then allowed on the fair market value of the diminution.

¶ 22 Similarly, in the present case, damages resulted from the loss of plaintiffs' interest in a piece of real property—the North Plains Mall—and assessing the amount of loss involved a fair market valuation of the property. Hence, the language from *San Pedro* is applicable:

> We, therefore, have a case in which, for the purpose of fixing damages, the injury is complete; the damages are ascertained by the ordinary rules of evidence and according

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[6] Utah Code Ann. § 78-27-44 (2002) creates a statutory right to prejudgment interest on special damages in personal injury cases.

> to a known standard or measure of value. And all this must be determined from competent evidence, which is binding upon both the court and jury. The jury, therefore, only had a right to exercise their judgment within the limits of the evidence upon the question of value. It is not a case where it was left to the jury to determine the amount of damages from a mere description of the wrongs done or injuries inflicted whether to person, property or reputation.

99 P. at 267.

¶ 23 Where, as here, damages were complete as of the day the property was transferred to the REIT and the jury based its award of damages on competent testimony from an appraiser who used generally accepted principles in determining the market value of the real property, an award of prejudgment interest is appropriate. The fact that the parties disputed the value of the property at trial does not change our conclusion that the jury's determination of the property's value was "ascertained . . . in accordance with fixed rules of evidence and known standards of value." *Fell*, 88 P. at 1007.[7] Therefore, we uphold the trial court's decision to award prejudgment interest.[8]

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[7] Two Utah Court of Appeals decisions have held that fair market valuations are too "inherently uncertain" to support prejudgment interest awards. *Klinger v. Kightly*, 889 P.2d 1372, 1381 (Utah Ct. App.1995); *Price-Orem Inv. Co. v. Rollins, Brown, & Gunnell, Inc.*, 784 P.2d 475, 483 (Utah Ct. App.1989). These decisions are inconsistent with the interpretation of *Fell* set forth in *San Pedro* and *Kimball*, which we follow today. We further note that fair market valuations of real property have long been relied on for prejudgment interest awards in the context of condemnation proceedings. *See* Utah Code Ann. § 78-34-11 (2003).

[8] "'[W]e may affirm a trial court's decision on any proper ground(s), despite the trial court's having assigned another reason for its

III. EXCESSIVENESS OF THE PREJUDGMENT INTEREST AWARD

¶ 24 Having upheld the trial court's decision to award prejudgment interest, we now decide whether the trial judge erred in denying a new trial or remittitur on the amount of prejudgment interest awarded. Following the jury's verdict, Price attacked the compensatory award under rule 59(a)(5) and (6) of the Utah Rules of Civil Procedure, contending that the prejudgment interest component of the compensatory award was excessive and not supported by the evidence presented at trial. Under rule 59(a), a trial judge may grant a new trial or remittitur of damages when, inter alia, there are "[e]xcessive or inadequate damages, appearing to have been given under the influence of passion or prejudice," or there is an "[i]nsufficiency of the evidence to justify the verdict or other decision." Utah R. Civ. P. 59(a)(5)-(6) (2003); *see also Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 802-03 (Utah 1991).

¶ 25 We apply an abuse of discretion standard in reviewing a trial judge's decision to grant or deny a new trial or remittitur on the amount of compensatory damages. *Crookston*, 817 P.2d at 803-05 (distinguishing between the trial court's direct review of a jury's award under rule 59 and the appellate court's subsequent review of the trial court's actions). "Under our rule 59, it is well settled that, as a general matter, the trial court has broad discretion to grant or deny a motion for a new trial." *Id.* at 804 (citations omitted). Under this standard of review, "we will reverse only if there is no reasonable basis for the decision." *Id.* at 805.

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ruling.'" *Gibbs M. Smith, Inc. v. United States Fid. & Guar. Co.*, 949 P.2d 337, 342 n.3 (Utah 1997) (quoting *Buehner Block Co. v. UWC Assocs.*, 752 P.2d 892, 895 (Utah 1988)).

¶ 26 Through the use of an expert witness, the Smiths presented detailed interest calculations at trial reflecting an interest amount due of $597,221. The interest rate used by the Smiths' accounting expert to calculate the interest due the Smiths was apparently derived from the partnership agreements. *See* Utah Code Ann. § 15-1-1(2) (2002) (setting the legal interest rate at 10% per annum or, alternatively, any rate agreed upon by the parties). The jury, however, awarded $690,000 in prejudgment interest.[9] Because we find no evidence in the record to support the jury's addition of nearly $100,000 to the figures calculated by the Smiths' expert, we hold that the trial court's denial of remittitur constituted an abuse of discretion. Accordingly, we remit the prejudgment interest award to $597,221.[10]

IV. SUBMISSION OF PUNITIVE DAMAGES TO THE JURY

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[9] We note that in many cases, where the interest rate to be applied is straightforward and the necessary calculations are free of factual complexity, the amount of prejudgment interest to be awarded may be a question reserved for, and entered by, the trial judge instead of the jury. In this case, the partnership agreements set a floating rate dependent upon the prime rate calculated by a particular bank and adding two percentage points, which was apparently the rate used by the Smiths' expert in his calculations. Because the determination of such a rate requires factual inquiry, the interest calculations in this case were appropriately treated as a matter open to evidence.

[10] Courts may offer a remittitur of damages as an alternative to a new trial. The party against whom the rule 59(a) motion is brought may either accept the amount of damages that the court considers justified or submit to a new trial on the issue. *See Crookston*, 817 P.2d at 803-04; *see also Diversified Holdings, L.C. v. Turner*, 2002 UT 129, ¶ 9 n. 2, 63 P.3d 686; *accord* 11 Charles Alan Wright, Arthur. R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2815 (2d ed.1995).

¶ 27 Price contends that the district court erred in submitting the option of punitive damages to the jury. In Utah, punitive damages are available only upon clear and convincing proof of "willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and disregard of, the rights of others." Utah Code Ann. § 78-18-1(1)(a) (2002); *Behrens v. Raleigh Hills Hosp., Inc.*, 675 P.2d 1179, 1186 (Utah 1983). "While simple negligence will not support punitive damages, negligence manifesting a knowing and reckless indifference toward the rights of others will." *Diversified Holdings, L.C. v. Turner*, 2002 UT 129, ¶ 29, 63 P.3d 686.

¶ 28 Having reviewed the record in the light most favorable to the Smiths, we find that there is more than sufficient evidence to support the court's submission of the punitive damages question to the jury.[11] Price's actions display an intentional disregard of the Smiths' rights and of its fiduciary obligations. The court thus appropriately allowed the jury to evaluate the evidence and determine whether punitive damages were merited.

V. EXCESSIVENESS OF THE PUNITIVE DAMAGE AWARD

¶ 29 Price also challenges the punitive damage award for excessiveness, although the legal basis for Price's challenge is somewhat unclear. The Smiths argue that Price has not explicitly challenged the award on constitutional grounds and that our review of the award should therefore be limited to the issue of whether the trial judge abused his discretion in denying Price's motion for a new trial under rule 59(a)(5) of the Utah Rules of Civil Procedure on the basis that the punitive damages

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[11] *See* Background, *supra*, and part V, *infra*.

awarded were excessive. In response, Price argues that it has, in fact, mounted a constitutional challenge to the award and that, in any event, this court must conduct a de novo review of the excessiveness of the award.

¶ 30 Although Price characterizes its challenge to the award of punitive damages as a federal constitutional challenge, Price did not brief the factors that the United States Supreme Court has enunciated for evaluating whether an award of punitive damages is excessive under the Due Process Clause of the U.S. Constitution. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L.Ed.2d 809 (1996). Price focuses only on the *Crookston* factors, which were enunciated by this court in the context of a rule 59 motion for new trial on the grounds of excessive damages. *Crookston*, 817 P.2d at 801-03. Because Price failed to adequately brief the excessiveness issue as a federal constitutional challenge, we evaluate the punitive damage award for excessiveness under the *Crookston* factors.[12]

¶ 31 Although we evaluate the excessiveness of the punitive award under the *Crookston* factors, we note that the *Crookston* factors share at least some similarities with the *Gore* factors, which are used in evaluating a federal constitutional challenge.

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[12] This court is not obligated to address issues that are not adequately briefed. *State v. Gomez*, 2002 UT 120, ¶ 30, 63 P.3d 72 ("We do not reach Gomez's argument that the trial court denied him his right to due process or a fair trial because those constitutional claims were not adequately briefed."); *Smith v. Four Corners Mental Health Ctr., Inc.*, 2003 UT 23, ¶ 46, 70 P.3d 904 ("[W]e are not 'a depository in which [a party] may dump the burden of argument and research.'" (quoting *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998))); *accord Freund v. Nycomed Amersham*, 326 F.3d 1070, 1079 n.10 (9th Cir. 2003) (holding that the right to constitutional review of a punitive damage award may be "waived or forfeited like many other constitutional rights").

See infra notes 13 and 16 and accompanying text. We note also that this court has adopted a de novo standard for reviewing jury and trial court conclusions under the *Crookston* factors. *See Diversified Holdings*, 2002 UT 129 at ¶ 5, 63 P.3d 686; *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2001 UT 89, ¶ 13, 65 P.3d 1134 (*Campbell I*), *rev'd on other grounds*, --- U.S. ----, 123 S. Ct. 1513, 155 L.Ed.2d 585 (2003).[13] Accordingly, Price's failure to brief excessiveness as a federal constitutional issue does not alter the applicable standard of review. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S. Ct. 1678, 149 L.Ed.2d 674 (2001) (holding that federal due process requires de novo review of punitive damage awards appealed on constitutional grounds).

¶ 32 In *Crookston*, this court enunciated seven factors to be analyzed in evaluating whether a punitive damage award is excessive:

> (i) the relative wealth of the defendant; (ii) the nature of the alleged misconduct; (iii) the facts and circumstances surrounding such conduct; (iv) the effect thereof on the lives of the plaintiff and others; (v) the probability of future

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[13] In *Campbell I*, this court adopted a de novo standard of review for reviewing whether punitive damages are excessive under state law (the *Crookston* analysis). This was done apparently as a matter of judicial economy, *see Campbell I*, 2001 UT 89, ¶ 13, 65 P.3d 1134, in light of the fact that review of a punitive award under federal due process standards requires a de novo standard of review. *See Gore*, 517 U.S. 559, 116 S. Ct. 1589. A de novo standard for reviewing punitive awards under state law is also more consistent with the U.S. Supreme Court's decision in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 114 S. Ct. 2331, 129 L.Ed.2d 336 (1994) (holding that Oregon law, which granted trial courts great deference in reviewing the excessiveness of punitive awards, violated the defendants' rights to due process under the U.S. Constitution).

> recurrences of the misconduct; (vi) the relationship of the parties; and (vii) the amount of actual damages awarded.

817 P.2d at 808. We will now examine each of these factors.

A. The Relative Wealth of Price

¶ 33 We first consider Price's wealth.

> Our cases have determined that a defendant's wealth can be either an aggravating or a mitigating factor in determining the size of a punitive damage award, since punitive damages should be tailored to what is necessary to deter the particular defendant, as well as others similarly situated, from repeating the prohibited conduct.

Diversified Holdings, 2002 UT 129 at ¶ 15, 63 P.3d 686; *see also Campbell I*, 2001 UT 89 at ¶ 23, 65 P.3d 1134. In making this assessment, some courts have compared a punitive damage award with a company's net worth. *See, e.g.*, *Cash v. Beltmann N. Am. Co.*, 900 F.2d 109, 111 n.3 (7th Cir.1990); *Campbell I*, 2001 UT 89 at ¶ 23, 65 P.3d 1134. The Seventh Circuit Court of Appeals has held that a typical punitive damage award may be around one percent of the defendant's net worth. *Cash*, 900 F.2d at 111 n.3. We have emphasized that although such guidelines may be helpful, "in Utah there is no pre-established mathematical formula for such awards." *Campbell I*, 2001 UT 89 at ¶ 23, 65 P.3d 1134.

¶ 34 Price Development Company was a large owner and operator of commercial shopping malls and retail properties in the intermountain states. Its chairman and CEO, John Price, owned 99.99% of the company. In the court below, Price Development Company's total wealth was found to be in excess of $37 million. This amount was determined after

attempting to overcome the obstacles associated with commingled funds and the highly interrelated ownership and operations of various John Price entities, each of which had substantial assets. With Price Development Company valued at $37 million, the $5.5 million punitive damage award represents approximately 15% of the company's wealth. An analysis of the remaining *Crookston* factors will aid us in determining whether this percentage renders the award excessive under the facts of this case.

B. The Nature of Price's Misconduct

¶ 35 This factor requires us to analyze Price's misconduct in terms of "maliciousness, reprehensibility, and wrongfulness." *Campbell I*, 2001 UT 89 at ¶ 27, 65 P.3d 1134. It parallels the "reprehensibility" factor described by the United States Supreme Court in *Gore*[14] and recognizes that certain wrongdoings are more egregious and blameworthy than others so as to justify larger awards. *See Campbell I*, 2001 UT 89 at ¶ 27, 65 P.3d 1134; *Gore*, 517 U.S. at 575-76, 116 S. Ct. 1589. "Deliberate false statements, acts of affirmative misconduct, [and] concealment of evidence of improper motive" support more substantial awards, *Gore*, 517 U.S. at 579, 116 S. Ct. 1589, as do acts involving "trickery and deceit." *Id.* at 576, 116 S. Ct. 1589; *Campbell I*, 2001 UT 89 at ¶ 32, 65 P.3d 1134. The United States Supreme Court has also stated that "economic injury, especially when done intentionally through

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[14] The *Crookston* factors that consider the nature of a defendant's misconduct, the facts and circumstances surrounding the defendant's misconduct, and the probability of future recurrences (recidivism) are subsumed in the "reprehensibility" guidepost established in *Gore* as part of the federal punitive damage excessiveness analysis. *See Gore*, 517 U.S. at 575-80, 116 S. Ct. 1589; *Campbell I*, 2001 UT 89 at ¶¶ 27, 53, 65 P.3d 1134.

affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty." *Gore*, 517 U.S. at 576, 116 S. Ct. 1589.[15]

¶ 36 In this case, the jury found Price liable for breach of its fiduciary duty to the Smiths, breach of partnership agreements, and conversion of partnership assets. Along with the verdict, the trial court entered special findings stating that "the jury could have found by clear and convincing evidence a pattern of deceit, failure to disclose and misrepresentation." In particular, the court detailed Price's prolonged, deliberate failure to inform the Smiths of the execution of the contribution agreements and the resulting unavailability of the three options that Price originally gave the Smiths regarding how their interests could be handled in the REIT transaction. The court also detailed Price's conflicting and "intentionally misleading" calculations of the value of the Smiths' interests in the mall property in the REIT. The calculations given to the Smiths differed significantly from the company's own calculations, which the company did not reveal until six years of litigation had ensued. Additionally, the court detailed Price's acts of financial misconduct, including payment of excessive fees to itself as general partner, commingling funds from different Price-owned properties, and accruing interest to itself on its own capital contributions while denying the Smiths interest on their contributions.

¶ 37 We agree with the trial court that Price's actions amount to affirmative misconduct showing deliberate misrepresentation and disregard of the rights of the Smiths. Price's actions

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[15] "Behaviors that undermine the efficiency and integrity of the judicial process may also be considered under the rubric of the second [*Crookston*] factor." *Diversified Holdings*, 2002 UT 129 at ¶ 17, 63 P.3d 686.

accordingly support a substantial award of punitive damages.

C. Facts and Circumstances Surrounding Price's Misconduct

¶ 38 "This factor looks to the circumstances surrounding the illegal conduct, particularly with respect to what the defendant knew and what was motivating his or her actions." *Campbell I*, 2001 UT 89 at ¶ 35, 65 P.3d 1134. Throughout the creation of the REIT, Price was aware of its fiduciary obligations to the Smiths and of the consent clause written into the partnership agreements. Price consciously disregarded its obligations.

¶ 39 Price argues that the motivation for its actions was to benefit the Smiths and everyone involved in the REIT transaction. Price also reasserts that its actions were necessary to save the mall from foreclosure. However, the evidence presented at trial (and not fully marshaled by Price in its brief) was that Price, John Price, and the Price-related entities making up the general partnership all had significant financial incentives to carry out the REIT transaction. These incentives included repayment to Price of $27 million of loans made to the Price-related malls, acquisition of stock holdings in the REIT, elimination of $94 million of John Price's personal guarantees on existing loans for the mall and other properties, and deferral of federal income tax consequences.

¶ 40 With respect to Price's failure to disclose its dealings with the partnership property to the Smiths, Price asserts without elaboration that it avoided responding to the Smiths' inquiries on the advice of legal counsel. As noted by the trial court, substantial evidence was presented at trial that Price did not want the Smiths to interfere with the REIT's formation by filing an adverse claim or a lawsuit prior to January 1994 when the REIT went public. Thus, Price's self-interested actions, made

in the face of known fiduciary obligations, support a substantial punitive damage award.

D. Effect of Price's Misconduct on the Smiths and Others

¶ 41 This factor requires us to analyze the actions of Price in terms of their impact on the Smiths and others. Price's misconduct caused the Smiths to lose their partnership interests in the mall. Although this loss was significant, it does not appear from the evidence that it had a "devastating impact" on the Smiths. Nor did Price's actions have a "widespread effect on groups of vulnerable victims." *Diversified Holdings*, 2002 UT 129 at ¶ 20, 63 P.3d 686; *Campbell I*, 2001 UT 89 at ¶ 37, 65 P.3d 1134 ("The larger the number of people affected, the greater the justification for higher punitive damages."). Therefore, this factor individually does not support a sizeable punitive damage award.

E. Probability of Future Recurrences

¶ 42 "This factor analyzes the likelihood that the defendant will repeat or continue engaging in its wrongful behavior. A high probability of recidivism justifies a higher than normal punitive damage award." *Campbell I*, 2001 UT 89 at ¶ 41, 65 P.3d 1134 (citing *Gore*, 517 U.S. at 577, 116 S. Ct. 1589). Price argues that the REIT transaction was a one-time occurrence for the company so that future misconduct under the same circumstances is not foreseeable. The unlikelihood of a future REIT formation, however, does not bar the possibility of future misrepresentations and breaches of duty similar to those of this case. On the other hand, the record does not contain evidence of a pattern of regular deceit or other comparable acts perpetuated by Price in other business dealings or with other parties. *See TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 n.28, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) (noting

that courts should look to "'the existence and frequency of similar past conduct'" (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22, 111 S. Ct. 1032, 113 L.Ed.2d 1 (1991))).

F. Relationship of the Parties

¶ 43 "This factor analyzes the relationship between the parties, looking particularly at the degree of confidence and trust placed in the defendant." *Campbell I*, 2001 UT 89 at ¶ 44, 65 P.3d 1134. The fiduciary relationship of a general partner to a limited partner is one of loyalty, trust, disclosure, and confidence, calling for the utmost good faith and permitting no unfair benefits to the general partner as against the limited partner. We have stated in past cases that a breach of fiduciary relationship can support a large punitive damage award. *Id.*; *Diversified Holdings*, 2002 UT 129 at ¶ 23, 63 P.3d 686.

¶ 44 Price failed as a fiduciary to deal fairly with the Smiths and their partnership interests. The trial court noted in its special findings that, in addition to other inappropriate actions, Price failed to advise the Smiths of the potential conflicts of interest it had in forming the REIT with other Price-related entities. Price also disregarded the consent clause in the partnership agreements which, according to testimony in the record, was drafted in recognition of the Smiths' vulnerability within the partnership structure. The Smiths rightly expected a greater degree of candor and loyalty than they received. This factor weighs strongly in favor of a substantial punitive damage award.

G. Ratio of Punitive to Compensatory Damages

¶ 45 The ratio of punitive to compensatory damages is the final factor for our consideration. This court has not established an

absolute ceiling for the ratio of a damages award,[16] and a high ratio is not by itself determinative of excessiveness. *Diversified Holdings*, 2002 UT 129 at ¶ 24, 63 P.3d 686; *Campbell I*, 2001 UT 89 at ¶ 49, 65 P.3d 1134. However, the amount of a punitive damage award must bear a "reasonable and rational relationship" to the actual damages. *Crookston*, 817 P.2d at 810. "[A]n award that falls outside certain parameters will . . . elicit more searching judicial scrutiny." *Diversified Holdings*, 2002 UT 129 at ¶ 24, 63 P.3d 686. We have stated as a matter of flexible guideline that for "punitive awards of less than $100,000 a ratio of three to one will generally be justifiable, but for awards greater than $100,000, a somewhat lower ratio is usually appropriate." *Id.*

¶ 46 The United States Supreme Court recently scrutinized punitive damage awards under federal due process standards. *State Farm Mut. Auto. Ins. Co. v. Campbell*, --- U.S. ----, 123 S. Ct. 1513, 155 L.Ed.2d 585 (2003) (*Campbell II*). In discussing the issue of ratios between compensatory and punitive awards, the Court cited previous decisions in which it had noted that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *Id.* at 1524 (citing *Haslip*, 499 U.S. at 23-24, 111 S. Ct. 1032). While declining to adopt a rigid benchmark that a punitive damage award may not surpass, the Court instructed that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a

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[16] "[S]trict dollar amount, percentage of defendant's wealth, and ratio ceilings would allow potential defendants to calculate their exposure to liability in advance, thus diminishing the deterrent effect of punitive damages." *Crookston*, 817 P.2d at 809.

significant degree, will satisfy due process."[17] *Id.* "Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution. . . ." *Id.*

¶ 47 In the present case, the jury awarded the Smiths $5.5 million in punitive damages and $1.1 million in compensatory damages, producing a 5 to 1 ratio. We have already reduced the compensatory award, however, to $1,007,221 by remitting the amount awarded as prejudgment interest. The ratio resulting from this reduction is approximately 5.5 to 1, well within the single-digit ratio discussed by the Supreme Court in *Campbell II*.

¶ 48 Having concluded our assessment of the case under the *Crookston* factors, we find that Price's intentionally deceptive business dealings with individuals to whom it owed a fiduciary duty were sufficient to support a $5.5 million punitive damage award. We therefore uphold the punitive damages as awarded by the trial court. We believe that the evidence in the record and our overall analysis support an award of this amount as a serious reprimand for Price's actions to deter future misconduct.

CONCLUSION

¶ 49 We affirm (1) the trial court's denial of a directed verdict in Price's favor, (2) the trial court's decision to award prejudgment interest (on alternate grounds), (3) the trial court's submission of the issue of punitive damages to the jury, and (4) the jury's award of $5.5 million in punitive damages. We remit

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[17] The ratio of punitive to compensatory damages is the second guidepost within the federal *Gore* analysis. 517 U.S. at 580, 116 S. Ct. 1589.

the award of prejudgment interest from $690,000 to $597,221 to more accurately reflect the evidence presented by the Smiths' accounting expert at trial. The Smiths are further entitled to an award of reasonable costs and attorney fees as required by the partnership agreements. We remand to the district court for a determination of the proper amount of the award.[18]

¶ 50 Chief Justice DURHAM, Associate Chief Justice DURRANT, Justice NEHRING, and Judge MAETANI concur in Justice PARRISH's opinion.

¶ 51 Having disqualified himself, Justice WILKINS does not participate herein; District Judge HOWARD H. MAETANI sat.

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[18] The trial court awarded the Smiths reasonable costs and attorney fees pursuant to the terms of the partnership agreements, which provide: "In the event of any legal proceeding involving the interpretation or enforcement of the rights or obligations of the Partners hereunder, the prevailing party or parties shall be entitled to recover its reasonable attorneys' fees and costs." The Smiths have requested costs and attorney fees incurred in this appeal, and Price has not challenged the request. We therefore award the Smiths reasonable attorney fees and costs for this appeal. *Centurian Corp. v. Cripps*, 624 P.2d 706, 713 (Utah 1981) (granting prevailing party's request for attorney fees pursuant to contractual agreement and remanding for determination of amount).

APPENDIX B

Armand L. Smith, Individually and as trustee for the Armand L. Smith, Jr., Trust and the Shannon S. Windham Trust, and Virginia L. Smith, Plaintiffs

v.

Fairfax Realty, Inc., formerly Price Development Company, a Utah corporation, North Plains Land Company, Ltd., a Utah limited partnership, and North Plains Development Company, Ltd., a Utah limited partnership, Defendants

Civil No. 940904312CV

In The Third Judicial District Court
In And For Salt Lake County, State of Utah

July 2, 2001

JUDGMENT ON SPECIAL VERDICTS OF THE JURY FOR COMPENSATORY & PUNITIVE DAMAGES

The above-referenced case came on for trial by jury on Monday, the 26th day of March 2001, before the HONORABLE FRANK G. NOEL, Presiding Third District Court Judge, on the claims of the Plaintiffs (sometimes the "Smiths" herein) for breach of fiduciary duty, breach of contract, conversion of partnership property, and punitive damages, as well as the defendants' Price Development Company (n/k/a Fairfax Realty, Inc.) claim for declaratory judgment, the Plaintiffs appearing through and being represented by their attorneys of record, Robert S. Campbell and James E. Magleby of Salt Lake City and the Defendants appearing through and being represented by their counsel of record, Reed L. Martineau and Rex E. Madsen

of Salt Lake City.

A jury of eight persons with one alternate juror having been selected and empaneled by the Court to try the issues of fact, opening statements were made and evidence and testimony thereafter received on March 26, 2001 and continuing for 14 court trial days, during which time witnesses were sworn and testified, and documents were received by the Court. The parties, pursuant to stipulation, reserved the issue of attorneys' fees to the prevailing party as provided by Article 19 of the Partnership Agreements to be resolved by the Court after the return the jury's special verdict.

On Wednesday, April 11, 2001, both sides having rested their cases, the Court charged the jury as to the law to be applied to the evidence with respect to whether Price Development Company had breached its fiduciary duty to the Smiths, whether Price Development Company had breached its contract with the Smiths, and if so, whether Price Development Company had converted partnership assets and the damages, if any, sustained by the Smiths as a proximate cause or consequence of Price Development's conduct as well as whether punitive damages should be entered against Price Development Company and in favor of the Smiths. Closing argument was presented on the same day, April 11, 2001 and at approximately 3:10 p.m., the jury retired to deliberate on their special verdict.

At approximately 7:05 on said 11th day of April, 2001, the jury returned into open Court the following Special Verdict:

"SPECIAL VERDICT OF THE JURY

1. Did the defendant, Price Development Company, breach the partnership agreements, as alleged by

plaintiffs?

ANSWER: Yes __x__ No ____

2. Did the defendant Price Development Company, breach its fiduciary duties, as alleged by plaintiffs?

ANSWER: Yes __x__ No ____
If the answer to this question is "No," do not answer Question No. 3

3. Was Price Development Company's breach of fiduciary duty a proximate cause of any damages sustained by plaintiffs?

ANSWER: Yes __x__ No ____

4. Did the defendant Price Development Company, convert property belonging to plaintiffs?

ANSWER: Yes __x__ No ____

5. If you answered either Question Nos. 1, 3, or 4 "Yes," then state the total amount of all damages, if any, sustained by all plaintiffs together:

DAMAGES: $ 410,000 (Not including time value of money or "interest.")

DAMAGES due to time value of money or "interest." $ 690,000

6. Should punitive damages be awarded against Price Development Company and in favor of the Smiths?

ANSWER: Yes __x__ No ____

Dated this 11th day of April 2001.

Ashley James Anderson
Foreperson"

The Court having received and entered the Special Verdict of the Jury, thereupon proceeded with the punitive damage phase of the case, pursuant to stipulation of the parties, on the following morning, Thursday, April 12, 2001. Testimony and evidence were received with respect to the wealth and financial position of the defendant, Price Development Company, further closing arguments were made by counsel for the respective parties, and the jury thereupon retired to consider its Special Verdict on Punitive Damages.

At approximately 12:05 p.m. on said day, April 12, 2001, the jury returned into open Court its Special Verdict Re Punitive Damages as follows:

"MEMBERS OF THE JURY:

What amount of punitive damages should be awarded against Price Development Company?

$ 5,500,000

Dated this 12th day of April, 2001.

Ashley James Anderson
Foreperson"

The Court thereupon received the Special Verdict on

Punitive Damages and entered it upon the records of the Court. No party asked for the jury to be polled and the jury panel was thereupon dismissed and the Court adjourned with counsel for the Plaintiffs being requested to prepare the form of judgment.

The Court being now fully advised as to all and singular the law and fact in the premises, having concluded that the Special Verdict of the Jury and the Special Verdict Re Punitive Damages were duly and properly returned, and having entered Special Findings of the Court determining that there was evidence for the jury from which it could reasonably conclude that the amount of punitive damages awarded by the jury was justified under the facts and circumstances, which Special Findings should be annexed to and made a part of the Judgment, and that a Judgment should be thereupon entered upon said Verdicts in favor of the Smith Parties and against Price Development Company n/k/a Fairfax Realty, Inc. for breach of fiduciary duty, conversion of partnership property, breach of contract and punitive damages and that Price Development Company's claim for declaratory judgment should be denied and hence dismissed, and that the Court, pursuant to agreement and stipulation of the parties, has determined the amount of attorneys' fees to be awarded to Smiths as the prevailing party under Article 19 of both North Plains Development Partnership and the North Plains Land Partnership and as the prevailing party on the breach of fiduciary duty claims.

NOW, THEREFORE, for good cause shown,

IT IS ORDERED, ADJUDGED, AND DECREED:

I. THAT on the Special Verdict of the jury for breach of fiduciary duty, breach of contract and conversion of the partnership property, judgment be, and the

same is hereby entered, in favor of Armand L. Smith, individually and as Trustee for the Armand L. Smith Jr. Trust and the Shannon S. Windham Trust, and Virginia L. Smith and against Price Development Company n/k/a Fairfax Realty, Inc. in the sum and amount of $1,100,000.00, inclusive of $690,000.00 due to the time value of money or interest on the breach of fiduciary duty claims;

II. THAT on the Special Verdict of the Jury Re Punitive Damages for breach of fiduciary duty, judgment be, and the same is hereby entered, in favor of Armand L. Smith, individually and as Trustee for the Armand L. Smith Jr. Trust and the Shannon S. Windham Trust, and Virginia L. Smith and against Price Development Company n/k/a Fairfax Realty, Inc. in the sum and amount of $5,500,000.00;

III. THAT the combined and total judgment of 6,600,000.00 be and the same shall bear interest from the date of the judgment as provided by law;

IV. THAT the Plaintiffs, Smith Parties, be and they are hereby entitled to an award of attorneys' fees, costs and expenses as the prevailing party under Article 19 of the partnership agreements and under their claims for breach of fiduciary duty. The Court has considered the attorney fee application of $517,611.40 submitted by the Smith Parties, the affidavit submitted in support of the application by Carmen K. Kipp, Esq., and the other papers submitted by both parties on the issue of attorney fees. Based on these submissions, the Court finds and concludes as follows:

a. That Price Development has not contested that the Smiths are entitled to recover attorney fees and costs under the partnership agreements and for their breach of fiduciary duty claims;

b. That Price Development has not contested the Smiths Parties' attorney fee application to the extent it seeks $457,544.44, and thus this amount of attorney fees are reasonable. Independently, the Court finds these fees and costs are reasonable under the factors set forth in Dixie State Bank and as established by the uncontested affidavit of Carmen E. Kipp, Esq.

c. That the Smith Parties are also entitled to recover attorney fees and costs in the amount of (i) $34,000.00 for time spent on this case by lead trial counsel, Robert S. Campbell; (ii) $22,534.16 for attorney fees and costs incurred from the Snell & Wilmer law firm; and (iii) $3,522.88 for attorney fees and costs incurred from the Leverick & Musselman law firm. The Court further finds these attorney fees and costs are reasonable and consistent with the factors to be considered under Dixie State Bank, other controlling precedent, the additional factors set forth in the Utah Rules of Professional Conduct, and as established by the uncontested affidavit of Carmen E. Kipp, Esq.

d. That Judgment be and is hereby entered in favor of Armand L. Smith, individually and as trustee and Virginia L. Smith and against Price Development Company, n/k/a Fairfax Realty, Inc. for and in the amount of $517,611.40 as

reasonable attorney fees and $7,133.26 for reasonable costs and expenses;

V. THAT the Plaintiffs are entitled to their costs and expenses of Court, as provided by law;

VI. THAT Defendants, Price Development Company n/k/a Fairfax Realty, Inc. shall take nothing by its claim of declaratory judgment, and the said claim be and the same is hereby dismissed, no cause of action, with prejudice.

DATED this 29 day of June 2001

/s/ Frank G. Noel
Frank G. Noel
Presiding District Court Judge

APPROVED AS TO FORM:

ROBERT S. CAMPBELL, JR.
JAMES E. MAGELBY
Attorneys for Armand L. Smith and
Virginia L. Smith, et al.

REED L. MARTINEAU
REX E. MADSEN
Attorneys for Price Development Company
n/k/a Fairfax Realty, Inc., et al.

APPENDIX C

Armand L. Smith, Individually and as trustee for the Armand L. Smith, Jr., Trust and the Shannon S. Windham Trust, and Virginia L. Smith, Plaintiffs

v.

Fairfax Realty, Inc., formerly Price Development Company, a Utah corporation, North Plains Land Company, Ltd., a Utah limited partnership, and North Plains Development Company, Ltd., a Utah limited partnership, Defendants

Civil No. 940904312CV

In The Third Judicial District Court
In And For Salt Lake County, State of Utah

SPECIAL FINDINGS OF THE COURT ON PUNITIVE DAMAGE VERDICT OF THE JURY

Pursuant to the precedent of the Utah Supreme Court in Crookston v. Fire Insurance Exchange, 817 P.2d 789, 811 (Utah 1991), the Court herewith makes and enters Special Findings of Fact with respect to the punitive damage award returned by the jury in the above-referenced case on the 11th and 12th days of April, 2001, as follows:

1. The jury empaneled in this case returned into open Court a verdict of compensatory damages on April 11, 2001 of $1,100,000 and answer "Yes" to the question of whether punitive damages should be awarded against Price Development Company and in favor of the Smiths.

2. On the following day, April 12, 2001, the jury returned into open Court a verdict finding that the amount of punitive damages to be awarded against Price Development Company was $5,500,000.

3. With respect the jury's verdict of breach of fiduciary duty and conversion of partnership property by Price Development Company, there was substantial substantive evidence before the jury upon which a punitive damage award of $5,500,000 is considered reasonable.

4. The jury could have found by clear and convincing evidence a pattern of deceit, failure to disclose and misrepresentation with respect to the three "options" which Price Development personnel discussed with Armand Smith relative to formation by Price Development of a real estate investment trust. To that end, there was substantial evidence:

   - that Price Development failed to disclose to the Smiths that the Contribution Agreements were executed by Price Development in late September or October 1993, in which Price Development agreed to convey the North Plains Mall Property to another Price entity, Price Development Company, a Maryland limited partnership, for the benefit of the JP Realty REIT;

   - that said disclosure should have been made during the month of September, October or November, 1993, but was not made even in early December 1993 when Price Development submitted to Smiths a "preliminary estimate"

of the "REIT value" of the North Plains Mall;

- that the Contribution Agreement was not disclosed to the Smiths by Price Development until April 1994, nearly three months after the formation of the JP Realty REIT;

- that Price Development did not disclose to Smiths until March 1994 that they no longer had options with respect to their 15% interest of the North Plains Mall being kept out of the REIT, or such interest being purchased at the fair market value thereof;

- that the letter of March 8, 1994 setting forth an "original computation" and a "revised computation" of the Smiths' interest in the allocated REIT value of the North Plains Mall was false, misleading and deceitful;

- that Price Development Company did not want the Smiths to interfere by filing an adverse claim or potential lawsuit prior to January 21, 1994 when the J.P. Realty REIT was created, established and implemented;

- that the March 8, 1994 "revised calculation" of 312 units was intentionally misleading and was in wanton disregard of the partnership rights of the Smiths in the North Plains Mall Property;

- that Price Development Company never made an accurate accounting to the Smiths as to Price Development's own calculation of the "REIT value" of the Smiths' interest until the

year 2000, after nearly six years of litigation brought by Smiths to obtain an accounting and relief for breach of fiduciary duty;

- Price Development paid itself, as general partner, excessive fees beyond that clearly set forth in the Partnership Agreements;

- Price Development failed to maintain a separate bank account for the North Plains Mall Partnerships, co-mingling all funds from all Price owned properties and making it difficult to isolate and allocate revenues, costs, expenses and net income of the North Plains Mall Property;

- that Price Development accrued to itself interest on monies it advanced to the Partnerships, which it referred to as capital call contributions, but did not pay or accrue to the Smiths interest on their proportionate capital call contributions;

- that the Smiths were never advised by Price Development, as general partner, of the potential conflicts which it and the Price principals had with respect to the conveyance of the North Plains Mall Property from Price Development Company to Price Development Company, a Maryland limited partnership, for the benefit of the JP Realty REIT;

- that there was substantial evidence upon which the jury could have found that the conduct of Price Development Company in this case was

intentional and in wanton disregard of the rights of the Smiths.

- that the wealth of Price Development Company was reasonably in excess of $37,000,000 as of the end of December 1999.

- that the punitive damage award of the jury in this case of $5,500,000 was within the zone of reasonableness given the conduct of Price Development and the circumstances of the case and clearly was not excessive or disproportionate as to suggest or evidence passion or prejudice of the jury;

Dated this 29 day of June, 2001.

/s/ Frank G. Noel
HONORABLE FRANK G. NOEL
Presiding District Court Judge

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF UTAH

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Armand L. Smith, Individually
and as trustee for the Armand L.
Smith, Jr., Trust and the
Shannon S. Windham Trust, and
Virginia L. Smith,
Plaintiffs and Appellees,

v. No. 20010673-SC
940904312

Fairfax Realty, Inc., formerly
Price Development Company, a
Utah corporation, North Plains
Land Company, LTD., a Utah
limited partnership, and North
Plains Development Company, LTD.,
a Utah limited partnership,
Defendants and Appellants.

ORDER

This matter is before the court upon a Petition for Rehearing filed on October 15, 2003, by Appellant.

IT IS HEREBY ORDERED that the Petition for Rehearing is denied.

FOR THE COURT:

October 29, 2003
Date

/s/ Christine M. Durham
Christine M. Durham
Chief Justice

APPENDIX E

Brief of Appellants to Utah Supreme Court at 45 n.39:

The same conclusion is directed by federal law. Under the three guideposts for federal due process analysis – "'[1] the degree of reprehensibility of the [conduct]; [2] the disparity between the harm suffered . . . and [the] punitive damages award; and [3] the difference between this remedy [the punitive damage award] and the . . . penalties authorized or imposed in comparable cases,'" Campbell, 2001 UT 89, ¶39 (citing BMW, 517 U.S. at 574-75 (1996) – the award here is excessive and requires reversal or significant reduction.

APPENDIX F

Price Development Company,
Limited Partnership
35 Century Park-Way
Salt Lake City, Utah 84115

March 8, 1994

Armand L. Smith
P.O. Box 159
Clovis, New Mexico 88101

Re: North Plains Mall

Dear Armand:

Pursuant to our conversation of Thursday February 24 you will find enclosed the following documents:

1. A copy of the original computation of estimated value showing the allocation of 8,793 units in the new operating partnership to North Plains Mall. Your allocation of units is based on your 15% ownership interest (8,793 units x 15% = 1,319 units), and the issuance of units for the principal portion of your partner loan ($230,640 / $17.50 per unit = 13,179 units). The combined total units allocated to you would be 14,498 units. The value of the units is initial offering price of the REIT stock. Subsequent to the offering the value of the units will be equivalent to the value of the publicly traded shares.

2. A copy of the revised computation of estimated value schedule with the full accrual of interest on the

partner loans. Based on the computation the partnership would be allocated 2,348 units in the operating partnership. The allocation of units based on your ownership of 15% would be 352 units.

3. A copy of the balance sheets and a source and application of the due to managing general partner account for the period from December 31, 1988 through December 31, 1992; and

4. A copy of the same information starting October 31, 1989, showing the activity for the two months ending December 31, 1989. This schedule shows the change in the intercompany account for the general partner from the time of the capital call which was never picked up with the final settlement.

Based on our discussion, we would pay you the principal amount of your partner loan in the amount of $230,640 plus allocate to you 352 units in the operating partnership. The allocation of the units should make the transaction non-taxable. You should, however, consult with your tax advisor relative to any negative basis gains and the handling of your own personal tax considerations. If you have specific tax questions regarding the transaction, please call me and I will put you in touch with our tax advisor on this transaction.

Please review the enclosed items. If you have questions, please call.

Sincerely,

/s/ Paul K. Mendenhall
Paul K. Mendenhall

cc: John Price
Warren P. King
G. Rex Frazier
Martin G. Peterson

APPENDIX G

Schedule A2

Method 1
Value of North Plains Mall Based on Mr. Howden's
Appraisal on January 1, 1994
Various Treatments of Debt

	Measurement of Smith's Partnership Interests as of 3/15/01	**Analysis Two[A]**
1	Value per Howden Appraisal	$ 16,000,000
2	Less: Mortgage Loan Repayment	11,281,906
3	Value of Partnership Interests (Net of Chemical Bank Mortgage) (Line 1 less Line 2)	4,718,094
4	Less: Intercompany Loan Repayment	1,525,024
5	Less: Price Capita/Loan Repayment	1,869,751
6	Less: Smith Capital/Loan Repayment	329,956
7	Estimated Net Value of Partnership (Line 3 less Lines 4-6)	993,363
8	Smiths' Ownership Percentage	15%
9	Value of Smiths' Partnership Interests	149,004

[A] Includes Mortgage Loan, Includes Intercompany Loan, Includes Partner Capital/Loan

	(Line 6 Multiplied by Line 7) at 1/1/94		
10a	Plus: Adjustment for Time Value of Smiths' Partnership Interests at BankOne Prime +2% (1/1/94 to 3/15/01)		154,198
10b	Plus: Value of Water Rights contributed by Smiths to Partnership (approx. 1/1990)		30,000
11	Value of Smiths' Partnership Interests at 3/15/01 (Line 9 plus Line 10)	$	333,203

Measurement of Smith's Debt
Interests as of 3/15/01

12	Beginning Loan Balance of Smiths' as of approximately January 1990	$	228,390
13	Plus: Adjustment for Time Value of Smiths' Loan Balance at BankOne Prime +2% (1/1/90 to 1/1/94)		101,566
14	Value of Smiths' Debt Interests as of 1/1/94 (Line 12 plus Line 13)		329,956
15	Plus: Adjustment for Time Value of Smiths' Loan Balance at BankOne Prime +2% (1/1/94 to 3/15/01)		341,457
16	Value of Smiths' Debt Interests as of 3/15/01 (Line 14 plus Line 15)	$	671,413

Measurement of Smiths' Combined Partnership and Debt Interests as of 3/15/01

17	Value of Smiths' Partnership and Debt Interests at 3/15/01 (Line 11 plus Line 16)	$ 1,004,616
18	Plus: Expert Witness Fees	60,091
19	Total Damages, excluding Attorney's Fees, due Smiths (Line 17 plus Line 18)	$ 1,064,707

Supreme Court, U.S.
FILED
FEB 24 2004
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No. 03-1106

In The
Supreme Court of the United States

FAIRFAX REALTY, INC., formerly PRICE DEVELOPMENT COMPANY, NORTH PLAINS LAND COMPANY, LTD., AND NORTH PLAINS DEVELOPMENT COMPANY, LTD.,

Petitioners,

v.

ARMAND L. SMITH AND VIRGINIA L. SMITH,

Respondents.

On Petition For A Writ Of Certiorari To The Utah Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

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February 24, 2004

QUESTIONS PRESENTED

1. Did Petitioner fail to raise and brief a federal constitutional punitive damage excessiveness issue before the Supreme Court of Utah contrary to the requirements of Utah Appellate law and the precedent of this Court?

2. Even if Petitioner had raised and briefed a federal constitutional due process issue before the Supreme Court of Utah (which it plainly did not), should this Court grant certiorari to review another Utah Supreme Court decision which held, under a state *de novo* standard of review, that a $5.5 million punitive damage award, with $1 million in compensatory damages (a ratio of 5.5:1), was not excessive under Utah law given Petitioner's fraudulent, deceitful and reckless breaches of fiduciary duty and conversion of partnership assets, which directly harmed Respondents and occurred entirely in Utah?

PARTIES TO THE PROCEEDINGS

Petitioner, Fairfax Realty, Inc.,[1] formerly Price Development Company, a Utah corporation, is owned 99.99% by John Price, its Chairman and CEO and .01% by his wife, Marsha Price, both of Salt Lake City. Tr. 567, 2164. Price Development Company was the general partner of the North Plains Development Company, Ltd. and North Plains Land Company, Ltd., the partnerships which owned and operated the partnership property, the North Plains Mall.[2] Ex. P-15 at Art. 4; Ex. P-16 at Art. 4.

The Respondent, Armand L. Smith, is a citizen of Clovis, New Mexico. The Respondent, Virginia L. Smith, formerly of Clovis, is now a citizen of Austin, Texas.

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[1] The use of the name Fairfax Realty to describe the Petitioner herein obfuscates the real parties, the witnesses and the entire record below. The operative facts took place when Petitioner was Price Development Company, a Utah corporation. The name change occurred after the JP Realty REIT was formed. But, the name "Price" or "Price Development," not Fairfax Realty, is used throughout the testimony and evidence by the trial court and by the Utah Supreme Court to refer to Petitioner. Thus, Petitioner will be referred to as "Petitioner" or "Price."

[2] The Utah compensatory and punitive damage judgment, as affirmed in substantial part by the Supreme Court of Utah, was against *only* Fairfax Realty, Inc., formerly Price Development Company. As such, *only* Price Development is entitled to seek relief by way of the certiorari Petition. It necessarily follows that North Plains Land Company, Ltd. and North Plains Development Company, Ltd., do not have standing and are not proper petitioners in the certiorari Petition. *Penfield Co. v. SEC*, 330 U.S. 585, 589 (1947) (writ dismissed as to petitioner where no judgment was rendered against it below and no relief was sought by or against it on certiorari). Accordingly, references herein to Petitioner mean Price.

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JURISDICTION

This Court lacks jurisdiction under 28 U.S.C. § 1257(a). The Utah Supreme Court held that Price failed to raise and brief a federal constitutional issue under Utah Appellate law, and therefore declined to address a federal issue. Price claims it raised a federal issue below by citing a federal case in a footnote at the end of an unrelated 10-page state law argument at page 45 of a 50-page brief. Pet. 2. Such footnote is plainly insufficient to raise a federal question. The Petition's jurisdictional defect is discussed at greater length *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Contrary to Price's Statement (Pet. 3), the Fourteenth Amendment to the United States Constitution was not raised and briefed below, the Supreme Court of Utah declined to and did not decide the case on the Federal Constitution and, thus, it is not before this Court.

STATEMENT OF THE CASE AND FACTS

This is a fact-bound case in which Price, a Utah general partner and fiduciary of the two North Plains Mall Partnerships, deceived and defrauded the Smiths, two relatively small limited partners, by secretly contributing in September 1993 and conveying in January 1994 the entire partnership assets and interests to itself to form the JP Realty

REIT,[3] without notice and in breach of the Smiths' express consent provisions of the partnerships. Price "cooked" the partnership books in March 1994 in offering the Smiths *only **$6,160** for their entire 15% interest in the regional Mall*, and failed completely to make any accounting as to the fair market value of the Smiths' partnership interests. Price then continued the deceit and fraud through 5½ years of litigation until it casually disclosed during discovery in January 2000 its so-called "REIT value" calculation of the Smiths' partnership interests to be over $54,000, a value which Price's investment bankers had calculated in January 1994 but never disclosed to the Smiths. The jury found that the *fair market value*, vis-a-vis the invented "REIT value,"[4] of Smiths' partnership interests was over $1 million.

It is noteworthy that Price *did not appeal* to the Supreme Court of Utah the unanimous jury verdict and District Court judgment findings of breaches of fiduciary duty, intentional conversion of partnership assets, and breaches of contract, contending rather, that the Smiths suffered no compensable injuries from such breaches and conversion.[5] However, to read Price's Petition, the perception is that Price Development and its owner and CEO, John Price, were paragons of virtue as to Price's treatment of the Smiths. Not a single sentence of its Petition

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[3] The "JP" in the JP Realty REIT stands for "John Price."

[4] The District Court held prior to the trial, that in evaluating damages for the loss of Smiths' real estate partnership interests, the test was "fair market value" and not Price's self-invented "REIT value." Price never appealed the ruling.

[5] In fact, Price in December 2003, paid the compensatory damage elements of the state District Court judgment, as affirmed by the Utah Supreme Court. Resp. App. 5-8.

acknowledges the breaches of fiduciary duty and willful conversion of partnership assets, instead contending that Price's conduct was noble in all regards. It was just such arrogant and self-righteous conduct that translated into a willful, wanton and reckless disregard of the partnership interests of Armand and Virginia Smith, compelling a substantial award of punitive damages.

The Smiths' June 1994 complaint against Price went to trial by jury before the District Judge on March 26, 2001. A unanimous jury returned its verdict on April 12, 2001 concluding that Price breached its fiduciary duties to Smiths, intentionally converted partnership assets to its own purposes and breached the partnership agreements resulting in compensatory damages of $1.1 million.

The jury also determined, under unappealed Instructions, that Price's breaches of conversion were willful, malicious, and/or in reckless or wanton disregard of Smiths' rights and warranted punitive damages. Pursuant to Utah's bifurcation statute, the trial court then heard further evidence and argument and after further unappealed Instructions, a unanimous jury returned a $5.5 million punitive damage verdict. The District Judge, pursuant to Utah jurisprudence of *Crookston v. Fire Ins. Exchange*, 817 P.2d 789 (Utah 1991), articulated five pages of specific findings supporting the punitive damage award. The District Court also awarded Smiths attorneys' fees of approximately $517,000, not for the reasons suggested by Price,[6] but because fees were provided for in the Partnership Agreements. Exs. P-15, P-16 at Art. 19, Resp. App. 9.

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[6] Price wrongly suggests that the attorneys' fees were discretionarily awarded and had both a punitive and compensatory aspect. Pet. (I) 12, 15,

(Continued on following page)

The District Court denied Price's motions for a directed verdict and new trial from which an appeal to the Supreme Court of Utah was taken. In that appeal, Price did not raise a federal constitutional punitive damages excessiveness issue. Pet. App. 1a-2a, 15a.

FACTS

Price's Facts contain material misstatements and omissions, so as to unapprise the Court as to what the issues and evidence were at trial.[7]

1. ***The Parties and the North Plains Mall Partnerships.*** Price was one of the largest owner-operators of commercial shopping malls and retail properties in 7 states in the intermountain west. Ex. P-71. Its Chairman and CEO was John Price of Salt Lake City, Utah, who owned 99.99% and controlled all of the Price stock. Tr. 567, 2164. Respondents, Armand L. Smith ("Smith") and Virginia L. Smith (collectively "Smiths") were residents of Clovis, New Mexico, 200 miles east of Albuquerque.

In November 1984, Smiths entered into two substantially identical Land and Development Partnerships with Price, John Price and other Price executives to own, construct and operate the North Plains Mall (the "Mall") as a regional shopping center in Clovis. Exs. P-15 and P-16. The general partner of both partnerships with a 20%

16 fn.5. Attorneys' fees were clearly awarded to Smiths pursuant to the express provisions of Partnership Agreements and not as part of the judicially awarded compensatory or punitive damages. Resp. App. 9.

[7] Supreme Court Rule 15.2 admonishes counsel of their obligation to point out perceived misstatements in the Petition.

interest was Price controlled by John Price. The Smiths had a 15% limited partnership interest in both entities, Smiths having contributed the land for the Mall at 20% (or more than $500,000) less than its fair market value in return for the partnership interests. Tr. 194-98.

2. ***Price's Claim As General Partner.*** Although unmentioned in the Petition, a core issue at trial was whether Price had authority, as general partner, to convey the Mall to the JP Realty REIT without Smiths' consent. Both Partnership Agreements required 90% approval of the limited partners before the general partner could assign the partnership property to a non-partnership purpose. Exs. P-15, P-16 at Art. 7.1, 7.6. The 90% requirement was for the protection of the Smiths. Tr. 211-15. Price claimed that a conveyance of the Mall to a REIT was a partnership purpose and was authorized by the partnership agreements. Smiths' evidence was that Price's conveyance of the Mall to a REIT was a non-partnership purpose that required their 15% approval, and that any such conveyance without Smiths' approval would constitute a breach of fiduciary duty, a conversion of partnership assets and breach of the partnership agreements.

John Price, himself, settled the issue by *admitting* on cross examination that a conveyance of the Mall by Price to the REIT was not a partnership purpose. Tr. 578. The jury necessarily found that the REIT contribution and conveyance was not a "partnership purpose." Price did not appeal that issue.

3. ***The Mall Was Never In Financial Trouble.*** The Mall opened with forty tenants, including major anchors, JC Penney's, Wal-Mart, Zales and Bealles stores. Tr. 220. Later, Sears became another anchor tenant. Tr. 205. The Mall's typical occupancy rate was 93%, a good

rate for malls. Tr. 562-63. From 1986 to 1993 Price consistently informed the Smiths that it was pleased with the Mall's performance, and Price never once indicated that the Mall was headed toward financial trouble. Tr. 222-23, 251-55. In fact, the Mall's net operating income increased from $1,028,000 in 1990 to $1,242,000 in 1994. Tr. 374-83; Ex. P-141.

Contrary to Price's invented after-the-fact "financial trouble" argument (Pet. 6-7), in September 1991 Price's Mendenhall represented to Chemical Bank, the Mall's lender, the real strength of the Mall:

> I'm sure, as you have watched the progress of North Plains over the last year, you are as pleased as we are to see the project at over 95% occupancy. The market remains strong. The mall continues to dominant [sic] the retail market. Ex. P-146.

Moreover, contrary to Price's implication that the "capital call" made in December 1989 was to cover an operating "shortfall" (Pet. 6), the capital call was in fact to cover new capital construction of the theater and Sears building. Tr. 240, Ex. P-34. In a further fiduciary breach, Price consistently accrued compound interest to John Price and itself on their portions of the capital call, but not on the Smiths' interests. Tr. 247-48, 1771-72.

The Chemical Bank loan originally matured in October 1999, but was routinely rolled with a further extension "assumed" by Price to at least July 1994, if necessary. Tr. 1065-66, 1177-78. Price twice hired the same banker, A. Oliver, in 1988 to find long-term financing for several Price and John Price Malls simultaneously, and again in 1991. Tr. 1590, 1599, 1619. Oliver was not retained to find a potential buyer and did not even list the Mall for sale with real estate brokerages. Tr. 1615, 1619, 1620.

There was *no evidence* at trial that prior to the creation of the JP Realty REIT, the Mall was designated a "distressed" or "financially troubled" property. That testimony all came 7-9 years later in 2001 when Price was trying to rationalize and whitewash the conveyance of the Mall to itself, the REIT, without even attempting to obtain the Smiths' contractually required consent. Tr. 1719, 1784-85. In point of fact, the Mall had its most profitable year ever in 1993. Tr. 269.

4. *Price's Real Reason for the REIT and the Secret Mall Conveyance.* Contrary to Price's after-the-fact invention that it conveyed the Mall to its JP Realty REIT to avoid the Mall's insolvency (Pet. 6-7, Tr. 617, 1089), the REIT was *formed to confer extraordinary monetary benefits on John Price including the elimination of over $94.4 million of personally guaranteed debt on Price properties* in 7 states, much of which was due in 1994. Tr. 902-06; Ex. P-71 p. 8. Price openly told the investing public that the JP Realty REIT was:

> formed *to continue and expand the business* . . . of certain affiliated companies . . . owned and controlled by John Price, Chairman of the Board and Chief Executive Officer of the Company [JP Realty, Inc.]. Ex. P-71 p. 1 (emphasis added).

Contrary to Price's claim now made that the Mall could have been easily left out of the JP Realty REIT, the REIT's Prospectus listed the Mall as one of eight major, "premier and dominant" regional malls of Price which were "the centerpiece" and "a vital part" of the REIT. Tr. 1164, Ex. P-71 p. 3.

Price misstates the evidence that the tax consequences "were not a consideration" for Price conveying the Mall to itself without Smiths' consent. Pet. 8-9. Price's Mendenhall admitted at trial that preservation of tax status was the "*primary reason*" for Price contributing the Mall to the

REIT. Tr. 1923 (emphasis added). John Price personally had a negative partnership capital account of $4.7 million by the end of 1993 as a result of Price allocating ordinary tax losses, including depreciation, to John Price (totaling $1,452,000 in 1992-93 alone) while at the same time allocating $491,450 of "phantom taxable income" to Smiths. Tr. 1561, 1569-1571; Exs. P-70, P-56. This "creative bookkeeping" gave Price such a high negative capital account that a third-party sale in 1994 would have resulted in major adverse tax consequences to John Price.[8] Tr. 1570-71.

5. ***Price's Creation of the REIT in September 1993 and the 3 Phony Options.*** On July 18, 1993, two of Price's top officers, Mendenhall and Fraser, telephoned Smith to obtain a qualification statement regarding a REIT that Price had decided to pursue. Tr. 264, 475, 487. Smith knew nothing about a REIT and was concerned about the REIT's effect on Smiths' Mall partnership interests. Tr. 267. Mendenhall and Fraser then gave Smiths 3 options regarding Smiths' 15% interest in the Mall partnerships:

i. Price would cash out the Smiths;

ii. Price would contribute John Price's and other Price interests in the Mall to the REIT and Smiths would remain 15% partners;

iii. The entire Mall would be contributed to the REIT and Smiths would receive REIT stock. Tr. 270-71; Ex. P-57.

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[8] The jury and District Court also had before it significant evidence of Price's breach of fiduciary duty by its "dumping" monies from all Price properties into a co-mingled account with the Mall and by paying itself substantially inflated general partner management fees. Tr. 225, 1205-07, 1707.

While Mendenhall and Fraser told Smith that they would contact him again as to the options, they did not during all of July-October 1993. Tr. 274. Meanwhile, without Smiths' knowledge, Price formed the JP Realty REIT on September 8, 1993, and without Smiths' consent, Price secretly signed two back-dated "contribution agreements" with itself contributing the Mall to the REIT. Tr. 497-98, 507, 509-14; Exs. P-58 and P-59. Price then filed a September 15, 1993 preliminary S-11 Registration Statement with the U.S. Securities & Exchange Commission ("SEC"), which described all of the REIT properties including the Mall. Tr. 499-501, Ex. P-163. Price hired expensive Wall Street lawyers and investment bankers regarding the S-11 Registration, whose heavy expenses were allocated to the Mall without Smiths' knowledge or consent. Tr. 501-02, 1152-53.

Contrary to Price's erroneous and irrelevant statement that the "Mall was valued according to traditional REIT standards" (Pet. 10), the District Court, in an unappealed ruling, determined that the value of the Smiths' real estate partnership interests in the Mall was to be, in law, based on "fair market value" and not on Price's newly manufactured "REIT value." Tr. 1196-99, 1287-88. "REIT value" was admissible only as an attempt to explain Price's conduct. *Id.* Price's executives *admitted* that as the general partner of the Mall it did not obtain *and did not even want*, a fair market value analysis or appraisal of the Mall before it secretly contributed the Mall to the REIT. Tr. 363, 528, 1150. Price based its concocted "REIT value" on an erroneous "backed-into" capitalization rate. Tr. 363-64, 1165-68.

Price's deceitful failure to disclose the secret contribution of the Mall to its REIT in September 1993 turned into egregious fraud in December 1993. Responding to Smiths'

inquiry regarding the 3 options and the fair market value vis-a-vis "REIT value," Mendenhall wrote on December 2, 1993:

> *To date, we have not found an acceptable buyer willing* to pay a reasonable price for the property or a lender that would loan sufficient funds. . . . These facts are what prompted my conversation with you some time ago as to whether *you might have a group of investors who might be willing to purchase the property*.

Ex. P-65 (emphasis added).

When Mendenhall wrote the letter, *he knew that Price, as a fiduciary, had already secretly contributed the Mall to the JP Realty REIT nearly three months before, yet Mendenhall deceitfully states that no buyer has been found and implies that Smith should be seeking investors.* Tr. 1991-96; Ex. P-65.

6. ***Implementation of the JP Realty REIT.*** Price *failed to disclose* to the SEC or potential investors that it had non-consenting partners in the North Plains Mall. Ex. P-71. Smith was never provided a Prospectus until Price finally sent it (the sixth version) to Smith on January 13, 1994. Tr. 298-99. When Smith received the Prospectus, he still was unaware that the Mall had been transferred to the JP Realty REIT.[9] Tr. 300.

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[9] The plain answer to Price's footnote 11, Pet. 28-29, is that Smith was a layman, unadvised by securities lawyers, as to the REIT's effect. Additionally, the 116-page Prospectus did not disclose numerous factors, such as the secret back-dated contribution agreements, the Mall's fair market value, the non-existence of the 3 options, the Mall's so-called "REIT value," or the excessive fees Price paid to itself and co-mingling of accounts. Ex. P-71.

On January 21, 1994, the JP Realty REIT went public selling $198 million in stock at $17.50 per share to the investing public. Tr. 1935; Ex. P-71. Prior to January 21, 1994, Smith contacted Price several times to ask about the 3 options and Smiths' interest if the Mall was transferred to the REIT, but Price gave no answer. Tr. 299-300, 1161-62.

The REIT gave to the fiduciary, Price (owned 99.99% by John Price), and to John Price personally enormous benefits, including *inter alia*:

i. *The elimination of more than $94.4 million of John Price personal guaranties on the contributed properties, including the Mall.* Tr. 903, 906; Ex. P-71 pp. 8, 26;

ii. John Price, personally, wound up with 19.4% of the equity shares in the REIT. Ex. P-71, p. 65;

iii. A personal John Price entity received 200,000 of REIT voting shares entitling John Price to elect two of the seven REIT board. Tr. 907; Ex. P-71 pp. 8, 26;

iv. John Price along with a small number of Price executive officers, received stock options of 475,000 shares of JP Realty REIT. Tr. 907; Ex. P-71 pp. 8, 26;

v. The payment of $45.1 million to John Price's former partners (fiduciary relationship) in the Salt Lake City Cottonwood Mall, so that Price could contribute Cottonwood to the REIT. Tr. 899-900; Ex. P-71 pp. 7-8, 26;

vi. The deferral of income tax on millions of dollars of John Price's holdings. Tr. 902; Ex. P-71, p. 8;

vii. The REIT payment to Price Development of approximately $27.1 million in loans on the various malls and properties which were coming due in 1994. Tr. 904, 989; Ex. P-71 p. 28; and

viii. The release of John Price from maintaining at all times a bank-required $40 million personal net worth. Tr. 906.

Despite the foregoing substantial and material benefits realized by John Price,[10] Price and Price executives, there had been no accounting of the Smiths' 15% interest in the Mall. The Smiths were the only partners in the Mall who were not aware of the contribution to the REIT and of their loss of interest in the Mall property. Tr. 360-61, 513-14; Exs. P-15 and P-16 at Art. 4.

7. ***Why Price Failed to Disclose Its Contribution of the Mall to the REIT.*** Price claims it concealed its contribution of the Mall to the REIT upon advice of counsel, that the securities laws precluded disclosure because Virginia Smith was an "unaccredited investor." Pet. 8-9. Price's trumped-up rationalization of its breach of fiduciary duty was rejected at all levels of the Utah judicial process.

First, there is positively no pre-REIT written evidence of the "advice of counsel" or "unaccredited investor" contention, only the after-REIT oral excuse. Second, both Utah courts found that Price executives were very concerned that if they told the Smiths (or even Armand Smith

[10] Price asserts that John Price's personal stake was diluted by "several million dollars"; however, his interest was simply decreased without regard to Smiths, so the values would equate to what the stock market was willing to pay per share. Pet. 9; Tr. 1113-14.

who *was* an accredited investor) of the secret contribution, the Smiths could potentially make a claim or file an action that would impair the implementation of the JP Realty REIT. Pet. App. 20a, 36a. Third, a fiduciary cannot intentionally breach its fiduciary duty to its principals by conveying partnership assets to itself and then claim it was in a public offering "quiet time" precluding a disclosure. Price's *fundamental, over-arching obligation was that of a fiduciary* with a duty of full disclosure to the Smiths.[11]

8. ***Price "Cooked the Partnership Books."*** In February and March 1994, Smith continued to inquire about the 3 options and Smiths' 15% Mall interest. Tr. 300-08. On March 8, 1994, Mendenhall, with the specific authorization and consent of John Price and two other Price officers, created and faxed to Smith, Price's so-called "revised computation" of Smiths' "REIT value" in the Mall. Tr. 1999; Ex. P-82 pp. 1, 4. Bearing an intentionally false date of January 12, 1994 (Tr. 2004-05), Price's March 8 "revised computation" made the following accounting and proposal to Smiths:

i. The REIT value of Smiths' 15% interest in the Mall was ***$6,160*** (352 units at $17.50 p/unit);

ii. The total REIT value of the Mall was $41,090 (2,348 units at $17.50 p/unit);

iii. Smiths' 1989 "capital call" would be made available without interest. Tr. 343, 347, 349; Ex. P-82 pp. 1, 4.

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[11] Otherwise, bank employee embezzlers or corporate executives could successfully contend that because they were using the embezzled monies or assets in a federal securities offering, they could, upon the advice of counsel, shelter their wrongful conduct from disclosure.

Undisclosed was the fact that three months earlier, in January 1994, Price's investment bankers had calculated the total "REIT value" of the Mall to be based on 20,793 units or $363,877 (not 2,348 units or $41,090), and that Smiths' 15% interest had a "REIT value" of 3,119 units or $54,582 (not 352 units or $6,160). This January 1994 REIT value calculation *(8.86 times higher) was never disclosed to Smiths until forced through discovery in January 2000, after 5½ years of litigation.* Tr. 1868-71, 2011-14. Smith could not believe Price's letter and asked Mendenhall if Price was really serious about the $6,160 offer. Ex. P-85, Resp. App. 14. Mendenhall's answer was swift:

> Your understanding of the valuation and allocation of the units is *correct*. Ex. P-86, Resp. App. 15-16 (emphasis added).

It is uncontested that in the April 1994 meeting, Price's Mendenhall, upon being queried by Smith as to why Smith was the only Mall partner that had not been notified of the transfer of the Mall to the REIT, candidly stated that "due to the size and the significance of this [REIT] transaction, they [Price] *chose to ignore*" Smiths' interests. Tr. 360 (emphasis added). In late April 1994, Price finally sent to Smith a copy of the September 13, 1993 contribution agreement. Tr. 361, 513-14; Ex. P-90. Conspicuously missing was Price's high REIT computation of 20,793 REIT units as to the Mall. Tr. 1869.

9. *The Trial, Jury Verdict and District Court Findings on Punitive Damages.* Answering special interrogatories, the jury specifically found that Price breached its fiduciary duties, converted the Mall to itself and breached the Partnership Agreements and awarded $1.1 million compensatory damages. Pet. App. 26a-28a. The jury also determined that Price's conduct warranted punitive damages. Pet. App. 28a-29a. After further evidence

and instructions, the jury retired again and returned a punitive damage verdict of $5.5 million. Pet. App. 29a.

Subsequently, the District Court, following a state procedure established by the Supreme Court of Utah in *Crookston*, entered 5½ pages of Special Findings supporting the jury's $5.5 million punitive damage verdict, reciting specific evidence of Price's deceit, misrepresentations, breaches of fiduciary duties and conversion of the partnership assets. Price's Petition materially understates, distorts, and truncates the explicit and detailed trial court findings of Price's egregious misconduct. Pet. 12-13; but see actual Findings at Pet. App. 34a-38a.

10. ***Supreme Court Decision and Judgment.*** All questions raised by Price's appeal were state law issues, and, except for the state law excessiveness punitive damage issue, were reviewed by the Supreme Court of Utah under the state "abuse of discretion" standard (with facts viewed in the light most favorable to the jury's verdict). On October 3, 2003, the Supreme Court affirmed the District Court judgment in all respects with the exception of reducing the compensatory damages on the time value of money by approximately $93,000. Pet. App. 24a-25a.

As to the excessiveness of punitive damages, because Price failed to raise or brief a federal excessiveness issue on punitive damages, the Supreme Court of Utah conducted a *de novo* review of the evidence under the state law *Crookston* factors. Through ten pages of analysis, the Utah Supreme Court reviewed in detail Price's egregious misconduct, and stated:

> The fiduciary relationship of a general partner to a limited partner is one of loyalty, trust, disclosure, and confidence, calling for the utmost good faith and permitting no unfair benefits to the general partner as against the limited partner.

> We have stated in past cases that a breach of fiduciary relationship can support a large punitive damage award.

Pet. App. 22a. The Utah Supreme Court found the punitive to compensatory damage ratio of 5.5:1 to be clearly justified under the evidence:

> Having concluded our assessment of the case under the *Crookston* factors, we find that Price's intentionally deceptive business dealings with individuals to whom it owed a fiduciary duty were sufficient to support a $5.5 million punitive damage award. . . . We believe that the evidence in the record and our overall analysis support an award of this amount as a serious reprimand for Price's actions to deter future misconduct.

Pet. App. 24a.

REASONS WHY THE CERTIORARI PETITION SHOULD BE DENIED

I. Petitioner Failed to Raise a Federal Constitutional Question Before the Supreme Court of Utah as to Excessiveness of the Utah Punitive Damage Judgment and Now Attempts to Raise That Question Before This Court For the First Time.

The Petition should be easily denied. It is plain that Price failed to raise and brief before the Supreme Court of Utah a federal constitutional excessiveness claim under the Fourteenth Amendment as to the Utah punitive damage judgment, and attempts to raise that issue now for the first time before this Court. This Court has long held that:

> With very rare exceptions, we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless *it was either addressed by, or properly presented to, the state court that rendered the decision* we have been asked to review.

Adams v. Robertson, 520 U.S. 83, 86 (1997) (internal quotation and citation omitted) (emphasis added).

This Court looks to the law and appellate procedure of the state below to determine whether a federal constitutional issue was properly presented. *Wolfe v. North Carolina*, 364 U.S. 177, 194-95 (1960) ("Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy. . . .").

The Utah Rules of Appellate Procedure ("URAP") mandate that all constitutional issues be identified and spelled out in appellant's opening brief. URAP 24(a)(6) requires that *"Constitutional provisions . . . whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim* with the appropriate citation." (Emphasis added.) Resp. App. 17. In addition, URAP 24(a)(5) requires appellant to set forth in its opening brief "[a] statement of the issues presented for review . . . ." Resp. App. 18.

The record and briefing below could not be worse for Price. As to the requirement under Rule 24(a)(6), Price not only failed to raise a federal constitutional excessiveness issue in the Utah Supreme Court, ***it actually told the Utah Court that it was <u>not</u> raising a federal constitutional issue.*** Price's Opening Brief states:

"CONSTITUTIONAL PROVISIONS AND STATUTES

There are no constitutional provisions or statutes whose interpretation is determinative or of central importance to this appeal."

Price's Opening Brief at 3, Resp. App. 4 (bold added). Both the Utah Supreme Court and the Smiths were entitled to rely on this express representation by Price and they in fact did so. In its Statement of Issues raised under URAP 24(a)(5), Price simply queried "Was the jury's punitive damage award excessive?" but did not assert that the award was excessive under the federal due process clause. Resp. App. 3.

Absolutely fatal to its Petition, Price failed to brief a federal due process claim before the Utah Supreme Court. *See* URAP 24(a)(9); Resp. App. 19. Price's massive failure is witnessed by the glaring fact that at no place in its appeal to the Utah Supreme Court did it argue how the punitive damage judgment was "grossly excessive" under the three factors enunciated by *BMW v. Gore*, 517 U.S. 559, 568, 574-75 (1996) so as to "enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *Id.* at 568. Rather, Price urged and told the Utah Supreme Court that *"[t]he factors to be analyzed by this [Utah] Court in considering whether the punitive damage award was excessive in this case" are the 7 state law standards of Crookston*. Price Br. Supr. Ct. p. 37 (emphasis added); *Crookston*, 817 P.2d at 811.

The Supreme Court of Utah has long held that its Rules of Appellate Procedure require an appellant to raise and brief an issue on appeal: "This court . . . has held in numerous cases that we will not address issues not adequately briefed." *MacKay v. Hardy*, 973 P.2d 941, 947-48

(Utah 1998). Adequate briefing "requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority." *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998).[12]

Therefore, it was no surprise that the Utah Supreme Court made an express finding in its October 3, 2003 Decision that Price had not properly raised or briefed a federal constitutional question and thus, the Court would review the excessiveness of the punitive damage award under the state *de novo* standard of review applying the state law factors of *Crookston*. Wrote the Court:

> Price did not brief the factors that the United States Supreme Court has enunciated for evaluating whether an award of punitive damages is excessive under the Due Process Clause of the U.S. Constitution. . . . Price focuses *only* on the *Crookston* factors, which were enunciated by this Court in the context of a rule 59 motion for new trial on the grounds of excessive damages. *Crookston*, 817 P.2d at 801-03. . . . *We evaluate the punitive damage award for excessiveness under the Crookston factors.*

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[12] *See also State v. Bishop*, 753 P.2d 439, 450 (Utah 1988) ("[A] reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research.") Utah appellate courts routinely and consistently decline to review issues that are not briefed. *See, e.g., Smith v. Four Corners Mental Health Center, Inc.*, 70 P.3d 904, 916 (Utah 2003); *State v. Gomez*, 63 P.3d 72, 78 (Utah 2002); *Shattuck-Owen v. Snowbird Corp.*, 16 P.3d 555, 559 n.2 (Utah 2000); *State v. Jaeger*, 973 P.2d 404, 410 (Utah 1999); *MacKay*, 973 P.2d at 949; *Thomas*, 961 P.2d at 305; *Carrier v. Pro-Tech Restoration*, 944 P.2d 346, 354-55 (Utah 1997).

Pet. App. 15a (emphasis added) (footnote omitted). The Utah Supreme Court reviewed the case *de novo* and determined under Utah law that Price's "intentionally deceptive business dealings with individuals to whom it owed a fiduciary duty were sufficient to support a $5.5 million punitive damage award." *Id.* at 24a.

Price's failure to comply with Utah appellate law, as described above, creates an independent state procedural ground barring this Court's consideration of the newly-raised federal issue. *See Webb v. Webb*, 451 U.S. 493, 498 n.4 (1981). Because Price failed to raise a federal constitutional excessiveness issue before the Utah Supreme Court, the Smiths had no opportunity to and did not brief the question. The briefs and opinion below are *devoid* of any federal constitutional analysis. Consequently, the record in this case is not properly developed for review by this Court. *See Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988).

In what is a serious misstatement, the Petition sets forth that "there can be no doubt" that Price put the Utah Supreme Court on notice of its federal constitutional due process claim, quoting from its Opening Appellate Brief "[t]he same conclusion is directed by federal law" with a passing reference to the three guideposts under *BMW v. Gore*, 517 U.S. at 574-75. Pet. 2. What Price does not tell this Court in the text of its Petition is that the quoted paragraph *turns out to be but a footnote found at page 45 of its 50-page Opening Appellate Brief, tucked away at the end of a 10-page discussion of the state law analysis* of the punitive damage award. The accurate footnote page is reproduced at Resp. App. 21. Not only does the footnote fail to cite to the Fourteenth Amendment, it totally fails to analyze or brief the *BMW* factors under the facts of Price's misconduct in this case. All that it does is simply suggest

that there is also federal law that purportedly agrees with the conclusion of Price's state law analysis. That oblique *footnote* at the end of an unrelated state law argument cannot possibly rise to the standard of a federal due process challenge as the basis upon which certiorari jurisdiction of this Court is predicated. *Adams*, 520 U.S. at 88.[13]

Lastly, but not unimportantly, Price virtually ignores Supreme Court Rule 14.1(g)(i) which emphasizes the critical importance of showing this Court that a federal constitutional question was raised and claimed both in the trial court and in the Utah Supreme Court. With the exception of Price's page 45 footnote reference, the elements of Rule 14.1(g)(i) are conspicuously missing from its Petition.

To grant the Petition herein would require this Court to ignore Price's written representations to the Supreme Court of Utah *that it was not raising a federal constitutional issue*, and reverse an express decision of the Utah Court that Price did not properly raise and brief a federal constitutional issue as required by Utah law. That is something this Court has consistently declined to do. If the

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[13] The four cases cited by Price to support its unfounded claim that it raised the federal constitutional issue are inapposite. Pet. 2-3. In three of the cited cases this Court found that the federal constitutional issue in question was raised and considered below. *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 470 (2000); *Eddings v. Oklahoma*, 455 U.S. 104, 114 n.9 (1982); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 65 (1928). And unlike the Utah Supreme Court's express finding herein, none of those cases nor the fourth case, *Taylor v. Illinois*, 484 U.S. 400 (1988), indicate an express holding by the state court that the petitioner had failed to properly raise and brief the constitutional issue in accordance with state law.

Petition were granted, 28 U.S.C. § 1257(a) and Supreme Court Rule 14.1(g)(i) would cease to have meaning.

II. Even if Price Had Raised and Briefed a Federal Issue Below (Which It Plainly Did Not), The Petition Should be Denied Because the Utah Supreme Court, Like This Court, Has Not Established a Bright-Line Formula to Review a State Punitive Damage Judgment.

The thrust of Price's argument should not be lost on this Court. It asks this Court to grant certiorari to review a second decision in nine months of the Utah Supreme Court, the first being *State Farm Auto Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003), to hold that this Court did not mean what it said in *State Farm*. Price requests that the Court fix a due process mathematical formula of a 1:1 ratio of punitive to compensatory damages where compensatory damages are "substantial." Pet. 22.[14] Price does not define the meaning of "substantial," but finds something magical about the sum of "$200,000 or higher." Pet. 4, 18, 19.

This Court has refused to apply strict mathematical formulas in punitive damage cases because that would ignore the gravity and egregiousness of the misconduct and the individual facts of each case. *BMW v. Gore*, 517 U.S. at 582. In *State Farm*, the Court reemphasized its rejection of mathematical formulas. *Id.* at 1524. Although the Court stated that "few awards exceeding a single-digit ratio . . . *to a significant degree*, will satisfy due process,"

[14] Although confusing, Price sometimes suggests that a fixed ratio of slightly less than 5.5:1 would be acceptable to it. *See, e.g.*, Pet. 14-15.

the "precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id.* (emphasis added).[15]

The Supreme Court of Utah fully concurs with this Court that review of a punitive damage judgment is not to be governed by a bright-line or fixed-formula ratio. In the instant case, the Utah Supreme Court again rejected fixed bright-line ratios under Utah law, while recognizing that "the amount of a punitive damage award must bear a reasonable and rational relationship to the actual damages." Pet. App. 23a. In *Crookston*, the Utah Supreme Court explained why bright-line formulas undermine legal policy:

> [T]he absolute ceiling approach is too mechanical and could potentially defeat the very purpose of punitive damages. . . . For example, strict dollar amount, percentage of the defendant's wealth, and ratio ceilings, all would allow potential defendants to calculate their exposure to liability in advance, thus diminishing the deterrent effect of punitive damages.

Crookston, 817 P.2d at 809 (internal citations omitted). As both this Court and the Utah Court have noted, the justification of a punitive award depends substantially upon the

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[15] This Court has consistently rejected strict constitutional formulas. As Mr. Justice Holmes wrote in *Gompers v. U.S.*, 233 U.S. 604 (1914):

> "[P]rovisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil."

Id. at 610.

egregiousness and "reprehensibility" of the defendant's misconduct. Pet. App. 24a; *BMW*, 517 U.S. at 575-76.

Price's misconduct as a fiduciary to the Smiths was outrageous and highly reprehensible. Price intentionally engaged in deceit, fraud and conversion of Smiths' 15% partnership interests in a major shopping Mall, cooked the partnership books, rendered a bogus accounting, offered but $6,160 for the Smiths' interest in the Mall (found by the Utah Court to have a fair market value of over $1 million) and committed numerous other reprehensible acts. Price profited in the tens upon tens of millions from its fiduciary breach and conversion by secretly conveying the Mall into the JP Realty REIT which stock was sold on the New York Stock Exchange. Price's wanton and reckless misconduct was also demonstrated by the testimony of John Price, who as the CEO/owner of a fiduciary, repeatedly implied that he had little concern about the Smiths' Mall interests and reluctantly admitted that in March 1994, he authorized Price to offer the **$6,160** for Smiths' entire partnership interests. Tr. 587-613. Price's misconduct could easily warrant a ratio substantially higher than the 5.5:1 ratio determined by the Utah Supreme Court.

Yet, Price's Petition asks this Court to forget it failed to raise a federal constitutional issue and to carve out a departure from *State Farm* by fixing a straight-jacket formula 1:1 ratio of punitive to compensatory damages. Price then proceeds to give the Court, without analytical basis, its own 10-month report card on 23 post-*State Farm* punitive damage decisions throughout the country to argue that proper tribute is not being given to *State Farm* and that another decision of this Court is needed using a

1:1 ratio as virtually the only dispositive criteria. Pet. 4, 15, 16, 18, 19-22.[16]

The report card is of no value and the cases cited are inapposite and readily distinguishable. First, a federal constitutional due process question was plainly raised in the 23 cited cases, whereas, in the instant case, Price failed to raise a federal constitutional challenge and the Utah Court therefore reviewed *de novo* the punitive damage judgment under state law standards.

Second, there is no analysis, whatsoever, in Price's cited cases as to the gravity and reprehensibility of the defendants' misconduct, or of any of the highly relevant factors other than mathematical ratios in a federal excessiveness review. Thus, Price's case citations are meaningless.

Because Price's Petition rests fundamentally on the quest for a fixed mathematical formula of 1:1, the *actual* ratios of cases recently decided to be "grossly excessive" under the Fourteenth Amendment by this Court demonstrate the folly of Price's argument. In *BMW*, the ratio was ***500:1*** and was predicated upon BMW's conduct outside the borders of Alabama. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 426 (2001), the ratio was ***90:1***. In *State Farm*, the ratio was ***145:1*** for conduct that principally had little to do with Campbell's injuries and largely involved State Farm's conduct nationwide. *Contrast those high ratios to the **5.5:1** ratio in the instant case where all punitive damages awarded directly related*

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[16] Price's cited cases include *Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 661 N.W.2d 789 (Wis. 2003) which involved a 7:1 ratio. This Court denied certiorari in *Trinity* on December 8, 2003, No. 03-502.

to Price's egregious misconduct against the Smiths within the state of Utah. Notably, Price fails to even mention in its Petition the direct nexus of punitive damages to the Smiths or that Price was punished for conduct inside Utah's borders.

The bright-line mathematical formula sought by Price would not only undo and reverse the single digit rationale of *State Farm*, it would set a fixed formula ratio of 1:1 which would be warmly embraced by those of Price's animus and views of the business world. A fixed formula would be used by fiduciaries and others like Price in a pre-event cost-benefit risk analysis to handicap the odds and the effect of being caught in deceitful and fraudulent business conduct. *Crookston*, 817 P.2d at 809. Price's bright-line fixed-formula ratios under its Petition should be rejected.

III. Even if Price Had Raised and Briefed a Federal Constitutional Issue Below (Which It Clearly Did Not), the Petition Should Be Denied Because the Utah Supreme Court Conducted a Full *De Novo* Review of the Punitive Damage Judgment Under Utah Law.

The Utah Supreme Court stated that because Price failed to brief a federal constitutional issue, it would evaluate the punitive damage award under the *Crookston* state law factors. The Utah Court reiterated that it had "adopted a de novo standard for reviewing jury and trial court conclusions under the *Crookston* factors." Pet. App. 15a-16a (citation and footnote omitted). Those seven factors are: (1) The Relative Wealth of Price; (2) The Nature of Price's Misconduct; (3) Facts and Circumstances Surrounding Price's Misconduct; (4) Effect of Price's Misconduct on the Smiths and Others; (5) Probability of Future Recurrences; (6) Relationship of the Parties; and

(7) Ratio of Punitive to Compensatory Damages. Pet. App. 17a-23a; *Crookston*, 817 P.2d at 800.

The Utah Court then conducted a lengthy *de novo* analysis of the facts under each *Crookston* factor. Pet. App. 17a-24a. The Court opinion leaves no doubt that every *Crookston* factor was carefully reviewed *de novo*, whereupon the Court held that Price's fraud, deceit, and wanton disregard of the Smiths' partnership rights warranted the punitive award. Price is obviously unhappy with the outcome of the Utah *de novo* review, and it now asks this Court to instruct the Utah Supreme Court as to "how" to perform *de novo* review under Utah procedure and case law. Pet. 22. The Utah Court, however, needs no such tutoring.

Contrary to the plain dictates of the decision, Price claims that the Utah Supreme Court *de novo* review consisted of "doubly differential" approval of the District Court and jury verdict findings. Pet. 4, 23, 28. Price then proceeds to cherry pick selective out-of-context sentences from the Utah Court decision. Pet. 4, 13, 23. Price ignores that the Utah Supreme Court decision is replete with specific fact findings concerning Price's misconduct.[17] Pet. App. 14a-24a.

The Utah Court did *not* defer to the District Court's specific findings; instead, the Court made its own independent fact analysis, noted such District Court findings and ultimately agreed with them:

> *We agree with the trial court* that Price's actions amount to affirmative misconduct showing deliberate misrepresentation and disregard of

[17] Price engages in the same selective cherry picking in the four cases it cites in its "deferential" *de novo* argument. Pet. 23-24.

> the rights of the Smiths. Price's actions accordingly support a substantial award of punitive damages. Pet. App. 19a (emphasis added).

The Utah Court will not be faulted for stating certain findings and then after its own *de novo* review, concurring with them.

Further, Price wrongfully lifts out of context a quotation from the Utah Supreme Court opinion to support its misplaced argument that the Court opinion applied a deferential standard of review, quoting language to the effect that "[r]easonable minds could differ" as to whether Smiths were damaged by Price's wrongful conduct. Pet. 28 n. 10. Price does not disclose that the quoted language is **not**, however, from the section of the Utah Court's opinion dealing with excessiveness, **but is taken from the Utah Court's analysis affirming the trial court's denial of Price's motion for directed verdict** which is admittedly reviewed on appeal under "an abuse of discretion" standard. Pet. App. 7a; Resp. App. 3; *Mahmood v. Ross*, 990 P.2d 933, 937 (Utah 1999).

After Price mistakenly claims that the Utah Court did not conduct a *de novo* review, Price then conducts its own *de novo* review. Shorn of its obfuscating fleece, Price's analysis is a regurgitation of purported facts that were not credible, believed or determined by the jury, the District Court or the Utah Supreme Court.

Finally, Price claims that this Court needs to again "clarify" that under federal constitutional law an excessiveness analysis is conducted *de novo*. Pet. 30. This Court does not need to "clarify" anything. It has already articulated the rule on federal *de novo* review of punitive damage judgments. *Cooper Industries*, 523 U.S. at 436; *State Farm*, 123 S. Ct. at 1520; and *Norton v. Matthews*, 427 U.S. 524, 530-31 (1976) (no substantial jurisdictional question

is presented where a question has been settled by previous decisions of the Supreme Court). It is axiomatic that federal and state courts understand that *de novo* review means a new review of the facts.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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APPENDIX

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3. North Plains Mall Development Company Limited Partnership Agreement, p. 24, Art. 19 (1 page) ..... App. 9
4. Letter dated March 8, 1994 from Price's Mendenhall to Armand Smith with "Revised REIT Value Calculation" of $6,160 (3 pages).. App. 10
5. Letter dated March 16, 1994 from Smith to Price's Mendenhall on $6,160 offer ..... App. 14
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7. Utah Rule of Appellate Procedure 24(a)(6) ..... App. 17
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10. Opening Appellate Brief of Price Development to the Utah Supreme Court, p. 45, fn 39..... App. 20

IN THE UTAH SUPREME COURT

ARMAND L. SMITH,
Individually and as Trustee for
the Armand L. Smith, Jr. Trust
and the Shannon S. Windham
Trust, and VIRGINIA L. SMITH,

Plaintiffs/Appellees,

vs. Case No. 20010673-SC

FAIRFAX REALTY, INC.,
formerly PRICE DEVELOPMENT
COMPANY, a Utah corporation,
NORTH PLAINS LAND
COMPANY, LTD., a Utah limited
partnership, and NORTH PLAINS
DEVELOPMENT COMPANY,
LTD., a Utah limited partnership,

Defendants/Appellants.

BRIEF OF APPELLANTS

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT,
HONORABLE FRANK G. NOEL PRESIDING,
SALT LAKE CITY, STATE OF UTAH

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(e)(j) (1996).

STATEMENT OF ISSUES

I. As a matter of law and undisputed fact, did the plaintiffs (the "Smiths") suffer any damages that were caused by the alleged breaches of contract and breaches of fiduciary duty on the part of the defendants ("Fairfax") where Fairfax took the only alternative available to save the property at issue in this case from a total loss – contributing the property to a real estate investment trust ("REIT")?[1]

[1] Issue preserved at R 1736-39 (summary judgment motion); 4538 at 4-9, 55-56 (oral argument and ruling); 3202-03 (ruling); 1706-08, 3116-19 (motion in limine re: REIT damages); 1922-2009, 3129-32 (motion in limine re: Howden); 2013-19, 3120-28 (motion in limine re: Norman); 4538 at 56 (oral argument); 3201-04 (ruling); 4545 at 1002-08

(Continued on following page)

Standard of Review: In reviewing the Trial Court's denial of a motion for a directed verdict, this Court reviews "the evidence and all reasonable inferences that may fairly be drawn therefrom in the light most favorable to [the Smiths], and will sustain the denial if reasonable minds could disagree with the ground asserted for directing a verdict." *Mahmood v. Ross*, 1999 UT 104, ¶ 16, 990 P.2d 933.

II. Did the Trial Court err in submitting the issue of punitive damages to the jury in the absence of evidence that Fairfax willfully and deliberately disregarded the rights of the Smiths in a way that proximately caused injury?[2]

Standard of Review: A trial court's determination of whether sufficient evidence has been shown to submit a claim of punitive damages to a jury is a question of law, reviewed by courts de novo. *See Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 995 (10th Cir. 1999).

III. Was the jury's punitive damage award excessive?[3]

(directed verdict motion); 4545 at 1014 (ruling); 4551 at 2034 (directed verdict motion); 4551 at 2035 (ruling); 4551 at 2132 (instruction objections); 3754-63, 3782-88, 4265-80 (j.n.o.v. motion); 4508 (ruling).

[2] Issue preserved at R 4545 at 1002-05 (directed verdict motion); 4545 at 1014 (ruling); 4541 at 2034 (directed verdict motion); 4541 at 2035 (ruling); 4551 at 2133, 2139 (instruction objections); 3754-67, 3782-88, 4265-80 (j.n.o.v. motion); 4508 (ruling).

[3] Issue preserved at R 3738-3811, 4157-262 (motion for new trial or remittitur); 4553 at 3-27, 55-58 (oral argument); 4509-10 (ruling);

(Continued on following page)

Standard of Review: The Trial Court's decision in this regard is reviewed for correctness and is given no deference. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2001 UT 89, ¶13, 15, 432 Utah Adv. Rep. 44.

IV. Did the Trial Court err in submitting the issue of prejudgment interest to the jury and in entering a judgment including prejudgment interest; alternatively, was the evidence sufficient to support the amount of the jury's award of prejudgment interest?[4]

Standard of Review: Entitlement to prejudgment interest is a question of law reviewed for correctness. *Lyon v. Burton*, 2000 UT 19, ¶73, 5 P.3d 616. Evidence is insufficient to support a verdict "if, taking the evidence in the light most favorable to the prevailing party, the appellant demonstrates that the findings lack substantial evidentiary support." *Water & Energy Sys. Tech., Inc. v. Keil*, 2002 UT 32, ¶15, 48 P.3d 888.

CONSTITUTIONAL PROVISIONS AND STATUTES

There are no constitutional provisions or statutes whose interpretation is determinative or of central importance to this appeal.

4352-4407, 4469-75 (special finding objections); 4510 (ruling); 4493-98 (special findings).

[4] Issue preserved at R 1709-15, 3207-24 (motion in limine); 4538 at 61-65, 68 (oral argument); 3511-12 (ruling); 4539 at 92-99 (trial argument and ruling); 4551 at 2132, 2137, 2139 (instruction objections); 3720 (Instruction No. 44); 3799-3801, 4168-69 (motion for new trial or remittitur); 4553 at 28 (argument); 4509-10 (ruling).

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IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ARMAND L. SMITH, Individually and as Trustee for the Armand L. Smith, Jr. Trust and the Shannon S. Windham Trust, and VIRGINIA L. SMITH,	
Plaintiffs,	**RULE 58 B PARTIAL**
v.	**SATISFACTION OF JUDGMENT**
PRICE DEVELOPMENT COMPANY, a Utah corporation, n/k/a FAIRFAX REALTY, INC., NORTH PLAINS LAND COMPANY, LTD., a Utah limited partnership, and NORTH PLAINS DEVELOPMENT COMPANY, LTD., a Utah limited partnership,	Civil No. 940904312 CV Honorable Frank G. Noel Presiding District Court Judge
Defendants.	

The Plaintiffs Armand L. Smith, individually and as Trustee for the Armand L. Smith, Jr. Trust and the Shannon S. Windham Trust, and Virginia L. Smith ("Smiths"), by and through their counsel of record, Robert S. Campbell, pursuant to Utah Rule of Civil Procedure 58B, hereby acknowledge receipt of the following sum in part satisfaction of the Judgment on Special Verdicts of the Jury for Compensatory & Punitive Damages (the "Judgment"), entered by this Court on June 29, 2001, against the Defendants, Price Development Company n/k/a Fairfax Realty, Inc.:

DATE RECEIVED	**AMOUNT RECEIVED**
December 23, 2003	**$1,199,568.10**

The "Amount Received" listed above consists of the compensatory damages set out in paragraph I and costs under paragraph IV.d. of the Judgment as:

Compensatory Damages pursuant to ¶ 1 of the Judgment, (Including time value or "interest" as modified by the Utah Supreme Court).....	$1,007,221.00
Costs under paragraph IV.d. of the Judgment.....	$7,133.26
Subtotal	$1,014,354.26
Post-judgment interest on Subtotal amount at 7.34% p/annum	$185,213.84
(From June 29, 2001 through December 23, 2003)	
Amount Received herein under Part Payment of Judgment	**$1,199,568.10**

Except for this part payment and Satisfaction of a part of the Judgment of this Court as identified and set out herein, as affirmed and modified by the Utah Supreme Court to include appellate attorneys fees and costs which have yet to be specifically determined, the balance of said judgment remains unpaid and in full force and effect.

DATED this 23 day of December, 2003.

Respectfully submitted,

/s/ Robert S. Campbell
ROBERT S. CAMPBELL
JENNIFER K. ANDERSON-WHITLOCK
of and for
VAN COTT BAGLEY CORNWALL & MCCARTHY
Attorneys for Plaintiffs Armand L. Smith and Virginia L. Smith, et al.

ARTICLE 19

ATTORNEYS' FEES AND COSTS

In the event of any legal proceeding involving the interpretation or enforcement of the rights or obligations of the Partners hereunder, the prevailing party or parties shall be entitled to recover its reasonable attorneys' fees and costs.

North Plains Land Company Agreement of Limited Partnership, p. 23, Art. 19 (P. Ex. 15); and North Plains Development Company Agreement of Limited Partnership, p. 24, Art. 19 (P. Ex. 16).

(LOGO) PRICE DEVELOPMENT COMPANY,
LIMITED PARTNERSHIP
35 CENTURY PARK-WAY –
SALT LAKE CITY, UTAH 84115
TELEPHONE (801) 486-3911
TELECOPIER FAX (801) 486-7853

March 8, 1994

Via Facsimile
Original by Regular Mail

Armand L. Smith
P.O. Box 159
Clovis, New Mexico 88101

Re: North Plains Mall

Dear Armand:

Pursuant to our conversation of Thursday February 24 you will find enclosed the following documents:

1. A copy of the original computation of estimated value showing the allocation of 8,793 units in the new operating partnership to North Plains Mall. Your allocation of units is based on your 15% ownership interest (8,793 units x 15% = 1,319 units), and the issuance of units for the principal portion of your partner loan ($230,640/$17.50 per unit = 13,179 units). The combined total units allocated to you would be 14,498 units. The value of the units is initial offering price of the REIT stock. Subsequent to the offering the value of the units will be equivalent to the value of the publicly traded shares.

2. A copy of the revised computation of estimated value schedule with the full accrual of interest on the partner loans. Based on the computation the

partnership would be allocated 2,348 units in the operating partnership. The allocation of units based on your ownership of 15% would be 352 units.

3. A copy of the balance sheets and a source and application of the due to managing general partner account for the period from December 31, 1988 through December 31, 1992; and

4. A copy of the same information starting October 31, 1989, showing the activity for the two months ending December 31, 1989. This schedule shows the change in the intercompany account for the general partner from the time of the capital call which was never picked up with the final settlement.

Based on our discussion, we would pay you the principal amount of your partner loan in the amount of $230,640 plus allocate to you 352 units in the operating partnership. The allocation of the units should make the transaction non-taxable. You should, however, consult with your tax advisor relative to any negative basis gains and the handling of your own personal tax considerations. If you have specific tax questions regarding the transaction, please call me and I will put you in touch with our tax advisor on this transaction.

Please review the enclosed items. If you have questions, please call.

Sincerely,

/s/ Paul K. Mendenhall
Paul K. Mendenhall

cc: John Price
Warren P. King
G. Rex Frazier
Martin G. Peterson

NORTH PLAINS MALL
COMPUTATION OF ESTIMATED VALUE
JANUARY 12, 1994

A.	Net Operating Income For The Partnership	1,209,300
B.	Less Interest For Debt If Not Paid Off	(319,200)
C.	Less New Expense Related To Public REIT (510,000 Divided By 33,000,000 = (.01545) Times A)	
D.	Funds From Operations	890,100
E.	Reserve For Capital Expenditures And Working Capital (6.9%)	94.00%
	Payout Percentage	
F.	Funds Available For Distribution	836,694
G.	Capitalization Rate	9.00%
H.	Gross Value Before Debt Repayment, Prepayment Penalties, And Offering Expenses	9,296,600
I.	Less Debt Repayment	(11,246,906)
J.	Less Accrued Interest On Debt	(72,500)
K.	Less Prepayment Penalties On Debt	
L.	Less Intercompany Loan Payment	(1,680,916)
M.	Plus New Debt Allocation	4,800,000

N.	Less New Expenses On New Debt (3,968,000 Divided 95,000,000 = (.0417) Times M)	(206,400)
O.	Less Public Offering Expenses (2,600,000) Divided By 262,500,000 = (.009905) Times H	(92,083)
P.	Less Underwriting Costs And Expenses To Raise Capital To Pay Existing Debt (16,200,000 Divided By 174,000,000 = (.09310) Times I Plus L Plum [Sic] M)	(756,700)
Q.	Estimated Net Value Of The Partnership	41,095
R.	Estimated Initial Dividend (G Times Q)	3,699
S.	Estimated Total Partnership Units (D Divided By $17.50 Per Share)	2,348

ARMAND L. SMITH
P.O. BOX 159
CLOVIS, NEW MEXICO 88101

March 16, 1994

Mr. Paul Mendenhall
Price Development Company,
Limited Partnership
35 Century Parkway
Salt Lake City, UT 84115

Dear Paul:

This is relative to your March 8th letter which I received March 14th, concerning the North Plains Mall.

As I understand your offer it is:

1. Repayment of partnership loan in the amount of $230,640, in cash. This would be the total amount without any interest.

2. Value of 15% equity in project for 352 units in operating partnership at a value of $17.50 per unit or a total of $6,160.

Is my understanding of your offer correct?

Sincerely,

/s/ Armand Smith
Armand Smith

ALS/dd

[LOGO] PRICE DEVELOPMENT COMPANY,
LIMITED PARTNERSHIP
35 CENTURY PARK-WAY •
SALT LAKE CITY, UTAH 84115

TELEPHONE (801) 486-3911
TELECOPIER-FAX (801) 486-7653

March 17, 1994

Via Facsimile
Original by Mail

Armand L. Smith
P.O. Box 159
Clovis, New Mexico 88101

Re: North Plains Mall – Clovis, New Mexico

Dear Armand:

I have received the facsimile copies of your letters of March 14 and March 16, 1994. In response to your questions:

1. F. Charles Huber is our tax advisor on the transaction. He can be reached in care of Huber, Erickson and Bowman; 175 East 400 South; Salt Lake City, Utah 84111. His telephone number is (801) 328-5000. If there are any questions Chuck is unable to address, I can have you talk directly to the tax partner at Rogers & Well in New York.

2. With respect to interest on the loans from the partners, interest has been accrued on those loans but no interest has been paid.

3. Your understanding of the valuation and allocation of the units is correct.

If I can answer any further questions for you, please call.

Sincerely,
/s/ Paul K. Mendenhall
Paul K. Mendenhall

cc: G. Rex Frazier

UTAH RULE OF APPELLATE PROCEDURE 24(a)(6)

The brief of the appellant shall contain under appropriate headings and in the order indicated:

. . .

Constitutional provisions statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

UTAH RULE OF APPELLATE PROCEDURE 24(a)(5)

The brief of the appellant shall contain under appropriate headings and in the order indicated:

. . .

A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority . . .

UTAH RULE OF APPELLATE PROCEDURE 24(a)(9)

The brief of the appellant shall contain under appropriate headings and in the order indicated:

. . .

The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding.

IN THE UTAH SUPREME COURT

ARMAND L. SMITH Individually and as Trustee for the Armand L. Smith Jr, Trust and the Shannon S. Windham Trust, and VIRGINIA L. SMITH

Plaintiffs/Appellees,

vs. Case No. 20010673-SC

FAIRFAX REALTY, INC., formerly PRICE DEVELOPMENT COMPANY, a Utah corporation NORTH PLAINS LAND COMPANY, LTD., a Utah limited partnership, and NORTH PLAINS DEVELOPMENT COMPANY, LTD., a Utah limited partnership,

Defendants/Appellants,

BRIEF OF APPELLANTS

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT, HONORABLE FRANK G. NOEL PRESIDING, SALT LAKE CITY, STATE OF UTAH

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Salt Lake City, Utah 84145-0385

Attorneys for Appellants

claim, this Court should reduce the punitive damages significantly below the 3:1 guideline or, alternatively, grant a new trial.[39]

IV. The Trial Court Erred By Disregarding Controlling Utah Law Precluding Prejudgment Interest on an Unliquidated Claim and by Concluding That There Was Evidence Sufficient to Support the Amount of the Jury's Award of Prejudgment Interest.

Over Fairfax's objection, the Smiths presented evidence of, and the jury awarded, $690,000 in prejudgment interest on breach-of-fiduciary-duty damages, which were based on or derived from the fair market, appraised pre-REIT value of the Partnerships. (P-173; R 4388.) The Trial Court committed three errors with respect to prejudgment interest: first, the Trial Court erred in submitting the issue to the jury; second, the Trial Court erred by permitting interest on any damages derived from an estimate of the fair market value of the Partnerships; and third, the Trial Court erred in denying Fairfax's motion for a new trial or remittitur based on the jury's excessive award.

A. The Trial Court Erred In Submitting the Issue of Prejudgment Interest to the Jury.

It is well settled that the "decision to grant or deny prejudgment interest presents a question of law." Cornia v. Wilcox, 898 P.2d 1379, 1387 (Utah 1995). As such, the trial court erred in submitting the issue of prejudgment interest to the jury. As discussed above,

[39] The same conclusion is directed by federal law. Under the three guideposts for federal due process analysis – "'[1] the degree of reprehensibility of the [conduct]; [2] the disparity between the harm suffered . . . and [the] punitive damages award; and [3] the difference between this remedy [the punitive damage award] and the . . . penalties authorized or imposed in comparable cases,'" Campbell, 2001 UT 89, ¶39 (citing BMW, 517 U.S. at 574-75 (1996) – the award here is excessive and requires reversal or significant reduction.

Supreme Court, U.S.
FILED
MAR 9 - 2004
OFFICE OF THE CLERK

(3)

No. 03-1106

In the Supreme Court of the United States

FAIRFAX REALTY, INC., NORTH PLAINS LAND COMPANY, LTD., AND NORTH PLAINS DEVELOPMENT COMPANY, LTD.,

Petitioners,

v.

ARMAND L. SMITH AND VIRGINIA L. SMITH,

Respondents.

On Petition for a Writ of Certiorari to the Utah Supreme Court

REPLY BRIEF FOR PETITIONERS

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Union Pacific R.R. Co. v. *Barber*, 2004 Ark. LEXIS 128 (Ark. Feb. 26, 2004) 7

Constitutions, Statutes, Rules, and Regulations:

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REPLY BRIEF FOR PETITIONERS

As we explained in the petition, this case is emblematic of two errors that courts have been making with regularity in addressing excessiveness challenges to punitive damages awards under the due process clause: first, dozens of courts have misconstrued *State Farm* to afford a *de facto* free pass to any punitive award that is less than ten times the plaintiff's compensatory damages; second, in applying the reprehensibility guidepost, reviewing courts repeatedly have accepted every conceivable inference that might support a finding of high reprehensibility and taken the evidence in the light most favorable to such a finding rather than conducting a *de novo* review of the facts relevant to reprehensibility.

Respondents do not deny that courts routinely have been ignoring this Court's statements about 1:1 to 3:1 ratios being "instructive" and a ratio of 1:1 possibly being the constitutional maximum when compensatory damages are "substantial." Nor do they deny that most reviewing courts have put a heavy thumb on the scale by deferring to phantom factual findings when evaluating whether a punitive award is proportionate to the degree of reprehensibility of the conduct. Instead, they try to duck the issues entirely — first, by asserting that Fairfax's specific invocation of the due process clause and citation to *BMW* in its opening brief in the Utah Supreme Court were nonetheless insufficient to preserve a constitutional excessiveness issue for review by this Court, and then by mischaracterizing our position on the ratio issue and distorting the procedural history pertinent to the standard-of-review issue. When these diversions are swept aside, it becomes clear that this case is an excellent vehicle for addressing the two critical recurring issues presented in the petition.

REPLY STATEMENT OF FACTS

There is perhaps no better demonstration of the need for *de novo* review of the evidence relevant to the reprehensibility determination than respondents' statement of facts, which is replete with inaccuracies, misstatements, and exaggerations. Although it is not necessary for this Court to resolve factual disputes at this stage of the case, we respond here to some of respondents' more egregious distortions simply to illustrate why it is constitutionally deficient for courts to apply a sufficiency-of-the-evidence standard when determining whether the degree of reprehensibility of the conduct supports the amount of the punitive award.

1. *Contribution of the Mall to the REIT.* A central theme of respondents' Opposition is that the contribution of the Mall to the REIT was a sham transaction designed to benefit John Price at the expense of the Smiths. To that end, respondents contend that Price "admitt[ed] on cross examination that a conveyance of the Mall by Price to the REIT was not a partnership purpose" (Opp. 5), that the Mall was never in financial trouble (Opp. 5-7), and that the Chemical Bank short-term loan that financed the Mall's construction "was routinely rolled with a further extension 'assumed' by Price to at least July 1994, if necessary" (Opp. 6). In fact, Price's so-called "admission" was merely an acknowledgment that, at the time the Partnerships were created in 1984, no one contemplated that the Mall would later be transferred to a REIT. Tr. 578. The need to transfer the Mall to a REIT arose only after Fairfax received a notice of default from Chemical Bank, Chemical declined to grant Fairfax an additional extension on the loan and demanded payment of the balance in full, and Fairfax consequently was faced with imminent foreclosure due to a complete lack of prospects for selling or refinancing the property and to inadequate cash flow (facts that respondents do not, and cannot, dispute). Tr. 1073, 1089, 1106-07, 1719-20,

1922-23.[1] In short, even if a jury reasonably could infer that conveyance of the property to a REIT was not a valid partnership purpose from the mere fact that Price did not anticipate in 1984 that a REIT would be necessary ten years later (which we by no means concede), the reprehensibility guidepost would be robbed of much of its constraining force if reviewing courts are permitted to uncritically accept this kind of attenuated and illogical inference as "fact."

Respondents' assertion that Fairfax conveyed the Mall to the REIT in order "to confer extraordinary monetary benefits on John Price" (Opp. 7) is equally untenable. Though they recite a laundry list of benefits that Price allegedly received as a result of the REIT transaction (Opp. 11-12), respondents do not deny that Price would have received these same benefits regardless of whether the Mall was contributed to the REIT (Tr. 1123, 1326-27) — a fact that completely undercuts the inference about Fairfax's true motivations to which they claim they are entitled. They also ignore the undeniable fact that none of the partners in any of the other malls that were contributed to the REIT complained about the transaction (Tr. 1232) — a fact that again is impossible to square with the inference that Price was engaged in self-dealing. And the only rejoinder respondents have to the undisputed testimony that Fairfax did not need the Mall in order to proceed with the REIT is a citation of the REIT's prospectus, which listed the Mall as one of the eight major regional malls included in the REIT. Opp. 7. That response misses the point. To say that the Mall was one of eight major regional malls in the REIT is not to say that the REIT could not have gone forward without it.

---

[1] In what can only be characterized as a model of circularity, respondents place heavy emphasis on the fact that Chemical Bank agreed to extend the loan to July 1994. Opp. 6. It is undisputed, however, that Chemical did so ***because*** Fairfax had undertaken to organize a REIT to pay off the loan. Tr. 1075, 1175-76, 1235.

2. *The REIT value of the Mall.* As they did in the lower courts, respondents also assert vigorously that Fairfax swindled the Smiths by measuring their interest in the Partnerships by means of a "newly manufactured 'REIT value'" rather than fair market value. Opp. 9. Contrary to respondents' contention that the REIT value was "concocted" and based on "an erroneous 'backed-into' capitalization rate" (*ibid.*), however, the undisputed testimony at trial was that the REIT value used — the capitalized cash flow of each property — was recommended by the professional advising Fairfax as the only method that the market would accept for the purposes of the REIT offering. Tr. 1093-95, 1099, 1127-28, 1150, 1163-64, 1293-96.

Respondents compound this distortion by asserting that Fairfax "cooked the partnership books" by computing a March 1994 REIT value of their 15% interest in the Partnerships at 352 units (worth $6,160 at the prospectus price of $17.50 per unit) when a calculation only a few months earlier determined that respondents' interest consisted of 3,119 units (worth $54,582). Opp. 13-14. Absent from this recitation is the rest of the story: after the initial January 1994 calculation (and the day before the REIT closed), Fairfax informed Smith that he would receive 13,319 units from the REIT, worth $233,082.50 at the prospectus price. Tr. 1843, 1998. The latter figure remained constant until March, when Fairfax offered respondents 352 units in the REIT worth $6,160, plus $230,640 for respondents' capital contribution, for a total of $236,800.

Is a jury entitled to ignore these undisputed facts in determining liability for the underlying torts? Perhaps. But the purpose of *de novo* review of the *BMW* factors is to "ensure[] that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice." *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 123 S. Ct. 1513, 1520-21 (2003) (internal quotation marks omitted). That purpose cannot be achieved if reviewing courts continue to defer blindly to

every inference urged by the plaintiff's lawyers during the course of the trial.

ARGUMENT

1. *Jurisdiction.* Respondents argue at length that this Court lacks jurisdiction because Fairfax allegedly failed to raise a federal constitutional excessiveness claim before the Utah Supreme Court. They entirely ignore, however, this Court's repeated statement that a litigant need only put the lower court on notice as to the substance of a federal constitutional claim in order to preserve that claim for review. See Pet. 2, 3. Instead, respondents assert that Fairfax failed to comply with the Utah Rules of Appellate Procedure that require a litigant to identify constitutional provisions "whose interpretation is determinative of the appeal or of central importance to the appeal," to set forth in its opening brief a statement of issues presented for review, and to brief its constitutional claim before the Utah courts. Opp. 17-19. Respondents conclude that this failure "creates an independent state procedural ground barring this Court's consideration of the newly-raised federal issue." Opp. 20.

Respondents are mistaken. To begin with, the rule requiring quotation of "[c]onstitutional provisions * * * whose interpretation is determinative of the appeal or of central importance to the appeal" (Utah R. App. P. 24(a)(6)) was inapplicable because resolution of Fairfax's constitutional excessiveness argument depends on an application of the *BMW* guideposts, not an interpretation of the due process clause (it long ago having been settled that due process prohibits grossly excessive punishments). Equally misguided is respondents' assertion that Fairfax committed a procedural default by stating in its list of issues presented that the issue was whether the punitive damages were excessive without identifying the source of law upon which it was relying. The Utah Supreme Court evidently saw that as no impediment to consideration of

Fairfax's state-law excessiveness claim, so it equally cannot be a waiver of the federal excessiveness claim.

Respondents' final preservation point (and the only one upon which the Utah Supreme Court relied) is that Fairfax "failed to brief a federal due process claim before the Utah Supreme Court," by which they mean that Fairfax did not "argue how the punitive damage judgment was 'grossly excessive' under the three factors enunciated" in *BMW*. Opp. 18. To state that argument is to refute it. As respondents acknowledge (Opp. 20), Fairfax expressly asserted that the punitive award was excessive under the *BMW* guideposts for the same reasons that it was excessive under Utah's seven-factor standard. See Pet. 2. Moreover, the Utah Supreme Court itself confirmed the validity of Fairfax's position that analysis of the *BMW* guideposts "mirrors" analysis of the Utah standards (see Pet. 2 (quoting Fairfax's opening brief)) by repeatedly citing *State Farm*, *BMW*, and this Court's other punitive damages precedents in analyzing excessiveness under Utah law. See Pet. App. 18a-19a, 21a-22a, 23a-24a.

Respondents find great significance in the fact that Fairfax raised the federal argument in a footnote on page 45 of its 50-page brief (Opp. 20-21), but that is no basis for finding a lack of jurisdiction. The bottom line is that the footnote clearly put the Utah Supreme Court on notice of Fairfax's claim and that that court refused to address the issue out of what appears to be nothing more than a desire to avoid further review.[2]

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[2] The only case respondents cite for their contention that Fairfax's footnote constituted inadequate presentation of its constitutional claim is *Adams* v. *Robertson*, 520 U.S. 83 (1997). In *Adams*, however, the petitioners had never before raised the due process argument presented in its petition for certiorari and the lower courts therefore did not even acknowledge the issue's existence. Far from supporting respondents' position, this Court's holding in *Adams* that the citation of a federal case ***for a different proposition*** was "insufficient to inform [the] state court that it has been presented with

2. *Ratio.* Respondents' only response to our contention that the cases decided since *State Farm* demonstrate the need for further guidance regarding the ratio guidepost is to mischaracterize it. Contrary to respondents' characterization (Opp. 22 (see also Opp. 23, 24, 25, 26)), we have not asked the Court to "fix a due process mathematical formula of a 1:1 ratio of punitive to compensatory damages where compensatory damages are 'substantial.'" Our petition simply asks the Court to clarify that its statements that 1:1 to 3:1 ratios are "instructive" and that a 1:1 ratio often may be the constitutional maximum when compensatory damages are substantial were not merely precatory and that it therefore is improper to treat any single-digit ratio as being presumptively permissible. Respondents do not deny that the Utah Supreme Court's decision exemplifies this misconstruction of *State Farm*. Nor do they deny that numerous other courts have made the same error. Indeed, even in the roughly six weeks since we filed the petition, courts have continued to deem a single-digit ratio to be presumptively constitutional even when the compensatory award is quite substantial.[3]

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a [federal] claim" (*id.* at 88 (internal quotation marks omitted)) compels the conclusion that Fairfax's specific reference to the due process clause and quotation of the three *BMW* guideposts was sufficient to put the Utah Supreme Court on notice of its constitutional excessiveness claim.

[3] To the list in our petition may be added *Union Pacific Railroad Co.* v. *Barber*, 2004 Ark. LEXIS 128 (Ark. Feb. 26, 2004). In holding that a roughly 5:1 multiple that yielded a $25 million punitive award was not indicative of excessiveness, the *Barber* court focused exclusively on the Court's pronouncement that single-digit multipliers are more likely to comport with due process, ignoring its statements about 1:1 to 3:1 multiples being "instructive" and 1:1 possibly being the limit when compensatory damages are substantial. *Id.* at *53-*54.

3. *Standard of Review.* In answer to our contention that review is needed to provide further guidance regarding the nature of the required *de novo* review, respondents assert that the Utah Supreme Court conducted precisely the type of review we advocate (Opp. 26-28) and that there is no "need to 'clarify' anything" because "federal and state courts understand that *de novo* review means a new review of the facts" (Opp. 28, 29). They are mistaken in both respects.

The sole basis for respondents' assertion that the Utah Supreme Court "made its own independent fact analysis" (Opp. 27) is that court's statement that it agreed with the trial court that Fairfax's "actions amount to affirmative misconduct showing deliberate misrepresentation and disregard of the rights of the Smiths" (Opp. 27-28). In fact, this citation confirms the deferential nature of the Utah Supreme Court's review, coming as it did after that court had repeatedly recited the evidence in the light most favorable to the verdict (see Pet. App. 2a, 7a, 14a) and regurgitated the trial court's special findings (*id.* at 19a) — all of which were predicated on a "substantial evidence" standard, rather than a *de novo* standard (*id.* at 35a).[4] Indeed, the Utah Supreme Court itself expressly invoked the "substantial evidence" standard when evaluating the supposed motive for Fairfax's conduct. *Id.* at 20a. By contrast, nowhere in the opinion is there any indication that the Utah Supreme Court carefully considered Fairfax's arguments as to why the evidence does not warrant a conclusion that its

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[4] Respondents take us to task for pointing out the Utah Supreme Court's observation that "[r]easonable minds could differ" as to whether respondents were injured by Fairfax's conduct, noting that the court made that statement in the course of affirming the denial of Fairfax's motion for directed verdict, which was subject to an abuse-of-discretion standard of review. Opp. 28. That criticism misses the point, which is that, because this and other issues were close ones, a true *de novo* review of the evidence may well have resulted in the conclusion that Fairfax's conduct was not sufficiently egregious to support a $5.5 million punitive award.

conduct was reprehensible enough to support a $5.5 million punishment and why the various inferences respondents had urged on the jury and repeated in their brief were unreasonable ones. See pages 2-4, *supra*.

Respondents are equally mistaken in asserting that "federal and state courts understand that *de novo* review means a new review of the facts" (Opp. 29). As demonstrated in the petition, many courts, like the Utah Supreme Court, continue to import a sufficiency-of-the-evidence standard into their application of the reprehensibility guidepost. Accordingly, review is critical to correct this serious evisceration of *de novo* review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2004